

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NINGDE AMPEREX TECHNOLOGY,) CAUSE NO. 2:22-CV-232-JRG
LIMITED, ()
Plaintiff, ()
vs. ()
ZHUHAI COSMX BATTERY CO., LTD., (MARSHALL, TEXAS
) FEBRUARY 8, 2024
Defendant.) 8:00 A.M.

VOLUME 6

TRIAL ON THE MERITS
BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE
and a jury

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1 THE COURT: Be seated, please.

2 Counsel, before we turn to the charge and verdict form,
3 let me ask, were there items from the list of pre-admitted
4 exhibits used for the first time during the trial yesterday
5 and are you prepared to read those exhibits into the record at
6 this time should that have been the case? I don't want to
7 overlook this. If you're not ready for some reason, tell me.

8 MR. FINDLAY: I think it's the latter, Your Honor.
9 I apologize. I'll confer with Mr. Thompson, and we'll get it
10 straightened out.

11 THE COURT: We'll take this up before we bring the
12 jury in later this morning.

13 MR. FINDLAY: Yes, sir.

14 THE COURT: All right. Then let's turn to the final
15 jury instructions and the verdict form. I'll note for the
16 record that at the end of the evidence yesterday, the Court
17 released the jury until this morning.

18 During that interval, the Court heard lengthy arguments
19 regarding various motions for relief under Rule 50(a) of the
20 Federal Rules of Civil Procedure. The Court ruled on those
21 various requests. The Court carried one issue from the 50(a)
22 practice yesterday, and that was with regard to the asserted
23 counterclaims under the California extortion statute.

24 I am going to, with regard to that particular statute,
25 the Defendants -- well, with regard to that particular

1 statute, there was argument at the 50(a) stage regarding the
2 applicability and propriety of that portion of the
3 counterclaim brought by the Defendants. And having considered
4 that matter carefully overnight, I'm going to grant 50(a)
5 relief, excluding the counterclaim portion under the
6 California statute and find that, based on the
7 extraterritoriality issues, that it should not be and is not
8 appropriate as a part of this action.

9 There is clear state law authority from the state of
10 California which has also been adopted by the U.S. District
11 Courts and various districts in that state that there must be
12 a nexus with the state of California. There's no evidence
13 that I can find in this record before this jury that
14 establishes such a nexus or overcomes the presumption that the
15 enforcement of that statute should be limited to the state of
16 California.

17 So I'm going to not submit any issues, either
18 instructions or questions, to the jury on the California
19 statute. And I'm going to rule in CounterDefendant
20 Plaintiff's favor with regard to that issue pursuant to Rule
21 50(a).

22 Now, having done that, after the completion of the 50(a)
23 motion practice yesterday, the Court conducted an informal
24 charge conference with counsel in chambers where we undertook
25 a lengthy discussion of the final jury instructions and

1 verdict form as they then were constituted.

2 The Court reviewed multiple portions of the parties'
3 submission when they were not in agreement, heard fully from
4 each side, and had an opportunity to query counsel with regard
5 to any issues, agreed or disagreed, within those documents
6 where the Court if he would input would be helpful.

7 The Court reviewed the input from the parties, the
8 Court's reviewed overnight various authorities cited by the
9 parties for their competing positions, and the Court has now
10 generated what it believes to be the proper and appropriate
11 final jury instruction and verdict form for submission in this
12 case to this jury under this record.

13 And I've provided those documents to counsel for the
14 parties earlier this morning with an opportunity to review and
15 consider the same, and I now intend to conduct a formal charge
16 conference on the record where either party may lodge whatever
17 objections to the charge or verdict form that they believe are
18 supported by the law and necessitated by the interests of
19 their respective clients.

20 So with that, counsel, and as I discussed with you
21 yesterday, whoever's going to speak for Plaintiff and
22 whoever's going to speak for Defendant, if those two
23 individuals would go to the podium, we'll begin with the final
24 jury instructions and we will walk through that document
25 orally on a page-by-page basis.

1 And at any point along the way as we cover the material
2 page by page, if you have an objection to make as to something
3 you believe should not have been included or something that
4 you believe should not have been omitted, then you're free to
5 make those objections on the record.

6 So whoever's going to speak for the respective parties,
7 please go to the podium. And I really don't care if it's two
8 people or more than two people as long as we have one person
9 speaking for Plaintiff and one person speaking for Defendant.

10 I understand there's been an allocation of authority
11 between counsel with regard to the patent issues and the
12 antitrust issues, so it is not limited to two people only.
13 It's limited to one person per side as we go through the
14 process.

15 So with that, I'll turn to the final jury instructions,
16 beginning on the cover page or page 1. Is there objection
17 here from either Plaintiff or Defendant?

18 MS. YANG: Not from Plaintiff.

19 MR. TOTTEN: Good morning, Your Honor. Not from
20 Defendant.

21 THE COURT: Turning then to page 2 of the final jury
22 instructions, is there objection here from either party?

23 MS. YANG: No.

24 MR. TOTTEN: No, Your Honor.

25 THE COURT: Next is page 3, is there objection here?

1 MS. YANG: No objection.

2 MR. TOTTEN: No, Your Honor.

3 THE COURT: Next is page 4. Is there any objection?

4 MS. YANG: No objection.

5 MR. TOTTEN: No, Your Honor.

6 THE COURT: Page 5, is there any objection?

7 MS. YANG: No.

8 MR. TOTTEN: No, Your Honor.

9 THE COURT: Page 6, is there any objection?

10 MS. YANG: No objection.

11 MR. ANDERSON: Yes, Your Honor. Defendant has an
12 objection on page 6.

13 THE COURT: State your objection.

14 MR. ANDERSON: The objection is to the -- the
15 sentence that begins on page 6 and continues on the top of
16 page 7, imposing a burden of proof of clear and convincing
17 evidence in connection with the Noerr-Pennington claim. We
18 believe the correct standard is the preponderance of the
19 evidence standard, so we object on that basis.

20 THE COURT: All right. That objection is overruled.
21 Anything further on page 6?

22 If not, we'll turn to page 7. Are there any objections
23 here?

24 MS. YANG: No objection.

25 MR. TOTTEN: No objection.

1 MR. ANDERSON: Only that the sentence continues over
2 to page 7.

3 THE COURT: Duly-noted. That being the case, I'll
4 turn to page 8 of the final jury instructions. Are there
5 objections here from either party?

6 MS. YANG: No objection.

7 MR. TOTTEN: No, Your Honor.

8 THE COURT: Page 9, any objections?

9 MS. YANG: No objection.

10 MR. TOTTEN: No, Your Honor.

11 THE COURT: Page 10, any objections?

12 MS. YANG: No objection.

13 MR. TOTTEN: No, Your Honor.

14 THE COURT: Page 11, any objections?

15 MS. YANG: Yes, Your Honor. Plaintiff would like to
16 lodge an objection due to the omission of the curative claim
17 construction regarding the '352 Patent in view of the expert
18 testimony regarding the definition of the term 'corresponding'
19 portion rendered by CosMX's expert witness.

20 THE COURT: All right. That objection is overruled.
21 Anything further on page 11?

22 MR. TOTTEN: Not from Defendant, Your Honor.

23 THE COURT: Anything further here from Plaintiff?

24 MS. YANG: Nothing.

25 THE COURT: Then we'll turn to page 12. Is there

1 any objection here?

2 MS. YANG: No objection.

3 MR. TOTTEN: No, Your Honor.

4 THE COURT: Next is page 13. Any objection?

5 MS. YANG: No objection.

6 MR. TOTTEN: No, Your Honor.

7 THE COURT: Next is page 14. Any objection?

8 MS. YANG: No objection.

9 MR. TOTTEN: No objection, Your Honor.

10 THE COURT: Next is page 15. Is there any
11 objection?

12 MS. YANG: No objection.

13 MR. TOTTEN: No, Your Honor.

14 THE COURT: Page 16, any objection?

15 MS. YANG: None, Your Honor.

16 MR. TOTTEN: No, Your Honor.

17 THE COURT: Page 17, any objection?

18 MS. YANG: Yes, Your Honor. Plaintiff objects on
19 the basis that -- at the very bottom when we go into the
20 discussion of prior art, we object to the extent that there is
21 no instruction on the corroboration requirement of oral
22 testimony regarding the priority date for the alleged prior
23 art system.

24 THE COURT: All right. That objection is overruled.
25 Anything from either party on page 17?

1 MR. TOTTEN: No, Your Honor.

2 MS. YANG: No, Your Honor.

3 THE COURT: Turning to page 18, are there any
4 objections here?

5 MS. YANG: No objection.

6 MR. TOTTEN: No, Your Honor.

7 THE COURT: Page 19, are there any objections?

8 MS. YANG: No objection.

9 MR. TOTTEN: There is a minor typographical error in
10 the last paragraph, Your Honor. CosMX contend should be CosMX
11 contends. Other than that, no objection.

12 THE COURT: All right. I see that and I will
13 correct that typographical error.

14 Turning then to page 20, are there any objections here?

15 MS. YANG: No objection.

16 MR. TOTTEN: No, Your Honor.

17 THE COURT: Next is page 21, any objections?

18 MS. YANG: No objection.

19 MR. TOTTEN: No, Your Honor.

20 THE COURT: Page 22, any objections?

21 MS. YANG: No objection.

22 MR. TOTTEN: No, Your Honor.

23 THE COURT: Page 23, any objections?

24 MS. YANG: No objection.

25 MR. TOTTEN: No, Your Honor.

1 THE COURT: Page 24, any objections?

2 MS. YANG: No objection.

3 MR. TOTTEN: No, Your Honor.

4 THE COURT: Page 25, any objections?

5 MS. YANG: No objection.

6 MR. TOTTEN: No, Your Honor.

7 THE COURT: Page 26, any objections?

8 MS. YANG: No objection.

9 MR. TOTTEN: No, Your Honor.

10 THE COURT: All right. Pages 25 and 26 contain all
11 15 of the *Georgia-Pacific* factors. I gather by your decisions
12 not to object to those two pages, that neither party objects
13 to the jury being charged on all 15 of those factors. Is that
14 correct?

15 MS. YANG: That is correct, Your Honor.

16 MR. TOTTEN: Correct, Your Honor.

17 THE COURT: Okay. Anything on page 26 before we go
18 further?

19 MS. YANG: Nothing.

20 MR. TOTTEN: No, Your Honor.

21 THE COURT: I'll turn to page 27. Any objections
22 here?

23 MS. YANG: No objection.

24 MR. TOTTEN: No, Your Honor.

25 THE COURT: Page 28, any objections?

1 MS. YANG: No objection.

2 MR. ANDERSON: Your Honor, Defendant has an
3 objection on page 28.

4 THE COURT: State your objection.

5 MR. TOTTEN: We have two objections. One is the
6 objection I mentioned earlier about the clear and convincing
7 evidence burden of proof. I believe, as I mentioned, that the
8 burden should be preponderance of the evidence.

9 And then, secondly, we object to the submission to the
10 jury of an instruction on objective baselessness. We believe
11 that the appropriate *Noerr* instruction in this case is that --
12 is the test that omits objective baselessness based on cases
13 such as *USS POSCO Industries versus Contra Costa County*
14 *Building and Construction Trades Council*, 31 F.3d 800, 9th
15 Circuit 1994. And so I don't know if the Court wants me to
16 identify specific sentences, but those are the two objections
17 to this --

18 THE COURT: We had a lengthy discussion over this
19 issue. As a matter of fact, we had a lengthy discussion of
20 both issues you raise here in the informal charge conference.
21 And the Court's reviewed the competing authorities submitted
22 by the parties and considered this carefully, and I note your
23 objections in both regards, but they're both overruled.

24 Turning then to page 29, are there objections here from
25 either party?

1 MS. YANG: No objection.

2 MR. ANDERSON: Your Honor, we object to the first
3 sentence on page 29 on the grounds already indicated, that
4 first half of that sentence is a restatement of the objective
5 baselessness test.

6 THE COURT: All right. That's overruled. Anything
7 further on page 29?

8 MR. ANDERSON: Not from Defendant.

9 THE COURT: Then we'll turn to page 30 of the final
10 jury instructions. Are there objections here from either
11 party?

12 MS. YANG: No objection.

13 THE COURT: Defendant?

14 MR. ANDERSON: I'm sorry. No objection, Your Honor.

15 THE COURT: Then we'll turn to page 31. Any
16 objections here?

17 MS. YANG: No objection.

18 MR. ANDERSON: Your Honor, Defendant has an
19 objection on page 31.

20 THE COURT: State your objection.

21 MR. ANDERSON: The objection is to the omission of
22 an instruction on the impact of -- on the effect of a no-poach
23 agreement on anti-competitive conduct, the fact that that
24 would be a per se violation such that harm to competition
25 would be presumed, and we believe that issue as an accurate

1 statement of the law and should be given to the jury to inform
2 their analysis of anti-competitive conduct.

3 THE COURT: That objection is overruled. Anything
4 further on page 31?

5 MR. ANDERSON: No, Your Honor.

6 THE COURT: Turning then to page 32, are there any
7 objections here?

8 MS. YANG: No objection.

9 MR. ANDERSON: No objection.

10 THE COURT: Page 33, are there any objections?

11 MS. YANG: No objection.

12 MR. ANDERSON: No objection.

13 THE COURT: Page 34, any objections?

14 MS. YANG: No objection.

15 MR. ANDERSON: No objection.

16 THE COURT: Page 35, any objections?

17 MS. YANG: No objection.

18 MR. ANDERSON: No objection.

19 THE COURT: Page 36, any objections?

20 MS. YANG: No objection.

21 MR. ANDERSON: Your Honor, on page 36, Defendant
22 objects to the word 'significant' in the second full
23 paragraph, if you find that ATL had the specific intent to
24 achieve monopoly power in a relevant market and engaged in
25 significant anti-competitive conduct. We don't believe there

1 is any basis in antitrust law for asking the jury to evaluate
2 the degree of anti-competitive conduct. Anti-competitive
3 conduct is defined in the instructions previously without any
4 reference to them making that type of degreed determination.

5 If the jury concludes that there is anti-competitive
6 conduct, then that satisfies the elements of the antitrust
7 claim, and this instruction with that word we think confuses
8 the issue.

9 THE COURT: All right. Out of an abundance of
10 caution, I'm going to sustain that objection and I'll remove
11 the word 'significant'. Anything further on page 36 from
12 either party?

13 MR. ANDERSON: No, Your Honor.

14 THE COURT: Turning then to page 37, any objections
15 here?

16 MS. YANG: Your Honor, Plaintiff would like to
17 reserve the objection to the extent discussion regarding the
18 10 percent, 20 percent, 50 percent market shares are
19 inconsistent with case law.

20 THE COURT: All right. You said you'd like to
21 reserve the objection. I assume you're making the objection.

22 MS. YANG: Sorry. Yes.

23 THE COURT: All right. Well, that objection is
24 overruled. Anything further on page 37?

25 MR. ANDERSON: No, Your Honor.

1 THE COURT: All right. Turning then to page 38, any
2 objections here from either party?

3 MS. YANG: No objection.

4 MR. ANDERSON: No objection.

5 THE COURT: Page 39, any objections?

6 MS. YANG: No objection.

7 MR. ANDERSON: No objection.

8 THE COURT: Page 40, any objections?

9 MS. YANG: No objection.

10 MR. ANDERSON: No objection.

11 THE COURT: Page 41, any objections?

12 MS. YANG: No objections.

13 MR. ANDERSON: No objection.

14 THE COURT: Page 42, any objections?

15 MS. YANG: No objection.

16 MR. ANDERSON: No objections.

17 THE COURT: Page 43, any objections?

18 MS. YANG: No objection.

19 MR. ANDERSON: No objection.

20 THE COURT: Page 44, any objections?

21 MS. YANG: No, Your Honor.

22 MR. ANDERSON: No objection.

23 THE COURT: Page 45, any objections?

24 MS. YANG: No objection.

25 MR. ANDERSON: No objection.

1 THE COURT: And last but not least, page 46, any
2 objection?

3 MS. YANG: No objection.

4 MR. ANDERSON: No objection.

5 THE COURT: All right. Let's turn our attention
6 then to the verdict form. We'll follow the same approach.
7 Beginning with the cover sheet or page 1 of the verdict form,
8 is there any objection here from either party?

9 MR. WOLFSON: No objection, Your Honor.

10 MR. TOTTEN: No objection, Your Honor.

11 THE COURT: All right. For absolute certainty in
12 the record, let me just ask you, rather than say no objection,
13 please let me know if it's Plaintiff has no objection or
14 Defendant has no objection.

15 MR. WOLFSON: No problem.

16 THE COURT: I don't want any uncertainty. We'll
17 turn to page 2. Are there any objections here from either
18 party?

19 MR. WOLFSON: No objection for the Plaintiff, Your
20 Honor.

21 MR. TOTTEN: No objection for the Defendant, Your
22 Honor.

23 THE COURT: Page 3 where there are instructions
24 provided. Any objections here?

25 MR. WOLFSON: No objection from the Plaintiff.

1 MR. TOTTEN: Defendant has no objection, Your Honor.

2 THE COURT: All right. Turning then to page 4 where
3 Questions 1a, 1b, and 1c are found, are there objections here?

4 MR. WOLFSON: No objection from Plaintiff.

5 MR. TOTTEN: Defendant has no objection, Your Honor.

6 THE COURT: Turning to page 5 where Question 2 is
7 found, is there objection from either party?

8 MR. WOLFSON: No objection from Plaintiff.

9 MR. TOTTEN: Defendant has no objection.

10 THE COURT: Turning to page 6 of the verdict form
11 where Question 3 is found, is there objection here?

12 MR. WOLFSON: No objection from Plaintiff.

13 MR. TOTTEN: Defendant has no objection, Your Honor.

14 THE COURT: Turning to page 7 where Question 4 is
15 found, is there objection here from either party?

16 MR. WOLFSON: No objection from plaintiff.

17 MR. TOTTEN: Defendant has no objection.

18 THE COURT: Turning to page 8 of the verdict form
19 where Question 5 is found, is there objection here?

20 MR. WOLFSON: No objection from Plaintiff --

21 MR. ANDERSON: Your Honor, Defendant objects to the
22 submission of Question No. 5, both on the grounds that the
23 burden of proof we contend is incorrect, and because we do not
24 believe the objective baselessness should be submitted to the
25 jury for all the reasons we previously discussed.

1 THE COURT: And consistent with the Court's previous
2 rulings, that's overruled. Turning then to page 9 where
3 Question 6[a] and [b] are located, is there objection here?

4 MR. WOLFSON: Plaintiff has a limited objection,
5 Your Honor. Consistent with the previous questions in the
6 verdict form, we believe that this should say, did CosMX,
7 comma, the Defendant, comma, prove by the preponderance of
8 evidence that, and then ATL and so on for the rest of the
9 question.

10 THE COURT: Defendant have any objection to that?
11 It doesn't seem to be anything other than just a more fulsome
12 expression of what I think both sides agreed to.

13 MR. ANDERSON: That's correct, Your Honor. No
14 objection --

15 THE COURT: All right. Then I'll make that
16 addition. And that would cover Questions 6[a] and [b], and I
17 assume, turning to page 10, also Question 6[c] and [d].

18 MR. WOLFSON: Yes, Your Honor from Plaintiff's
19 perspective. And in 6[d], I believe it would be, What sum of
20 money, if any, did CosMX prove by preponderance of the
21 evidence would fairly compensate CosMX for the injury, similar
22 to Question No. 4.

23 THE COURT: All right.

24 MR. ANDERSON: I think would be worded --

25 MR. WOLFSON: Oh, yeah, do you find.

1 MR. ANDERSON: -- do you find CosMX has proven,
2 yeah.

3 MR. WOLFSON: So the wording would be, Do you find
4 CosMX has proven by a preponderance of the evidence, and then
5 the rest of the question as written.

6 THE COURT: So Question 6[d], as I understand it,
7 would read, Do you find from a preponderance of the evidence
8 that CosMX has proven what sum of money?

9 MR. WOLFSON: Yeah. Let me rephrase that, Your
10 Honor.

11 THE COURT: That's a little awkward.

12 MR. WOLFSON: Yeah. Let me try to read it. What
13 sum of money, if any --

14 THE COURT: -- did CosMX prove by a preponderance of
15 the evidence would fairly and reasonably compensate. I
16 haven't had my cup of coffee this morning. That seems a
17 better reading to me.

18 MR. WOLFSON: Yes. That was our intent in the
19 proposal, Your Honor.

20 THE COURT: Both sides agree to that?

21 MR. ANDERSON: Yes, Your Honor.

22 THE COURT: You agree to that, Mr. Wolfson?

23 MR. WOLFSON: Yes, Your Honor. Yes for Plaintiff.

24 THE COURT: All right. That is page 10. Anything
25 else on page 10 before we turn to the final page, page 11?

1 MR. WOLFSON: Nothing from Plaintiff, Your Honor.

2 MR. ANDERSON: Defendant has no further objections.

3 THE COURT: All right. Any objections on page 11,
4 the final page of the verdict form?

5 MR. WOLFSON: Nothing from Plaintiff, Your Honor.

6 MR. ANDERSON: Defendant has no objection.

7 THE COURT: Okay. That will complete the formal
8 charge conference. Thank you, counsel.

9 I will need a little bit of time to make these
10 adjustments. And as I told the jury earlier, I will prepare
11 and print for them eight individual copies of the final jury
12 instructions for them to have and be able to review while
13 deliberating in the jury room.

14 MR. FINDLAY: Your Honor?

15 THE COURT: What is it, Mr. Findlay?

16 MR. FINDLAY: I'm sorry. I didn't mean to
17 interrupt, but Mr. Thompson and I have obtained the
18 agreed-upon exhibit list from yesterday.

19 THE COURT: All right. Then let's proceed to read
20 those items into the record.

21 MR. FINDLAY: Exhibits that were used and then now
22 admitted from yesterday: JTX 1, JTX 3, JTX 18, JTX 37, JTX
23 74, DTX 16, DTX 23, and PTX 3.

24 THE COURT: All right. Does Plaintiff have any
25 objection to that rendition?

1 MR. THOMPSON: No objection, Your Honor.

2 THE COURT: All right.

3 MR. FINDLAY: Thank you, Your Honor.

4 THE COURT: As I told the jury yesterday, I asked
5 them to be prepared to begin at 9:00 this morning. I'll need
6 the ensuing time to print these copies and have everything
7 ready, but it is my hope and intent to begin as close to 9:00
8 as possible.

9 Are there questions from either side at this juncture
10 before I recess?

11 MR. THOMPSON: Nothing from Plaintiff, Your Honor.

12 MR. FINDLAY: No, Your Honor.

13 THE COURT: Okay.

14 MR. THOMPSON: I do have one question.

15 THE COURT: Too late. Too late.

16 MR. THOMPSON: Mr. Powell is finishing his closing
17 argument. Do you expect him to be here at 9:00 or is it all
18 right if he comes in --

19 THE COURT: No. I don't want anybody coming in,
20 walking around, or anything else once I start my final
21 instructions. If he's not here by 9:00, you can present the
22 Plaintiff's closing. Okay?

23 MR. THOMPSON: Thank you, Your Honor. We'll get him
24 here.

25 THE COURT: If I have to read 46 pages to this jury,

1 he can be here at 9:00.

2 All right. Court stands in recess.

3 (Brief recess.)

4 THE COURT: Be seated, please.

5 A couple of matters before I bring in the jury and
6 proceed to give them my final instructions.

7 Number one, I mentioned this to counsel in chambers, but
8 I want to say it one more time for the benefit of everyone
9 present.

10 The Court considers its final instructions to the jury
11 and counsel's closing arguments as the most serious part of an
12 inherently serious process. Accordingly, I do not want people
13 walking in and out of the courtroom. I do not want people
14 moving from chair to chair or bench to bench. I do not want
15 documents and boxes being shuffled around. In short, I do not
16 want anything that might detract or interfere with the
17 solemnity of this process during my final instructions and
18 counsel's closing arguments. So if there's anything you need
19 to do that might otherwise be disruptive, do it before I bring
20 the jury in.

21 Also, given the complexity of the counterclaim that's
22 been alleged here as well as the inherent complexity of the
23 patent litigation that forms the gist of Plaintiff's claims,
24 this is a very lengthy final jury instruction I'm going to
25 have to give.

1 I've had three different notes passed to me by a member
2 of the jury during the trial asking for restroom breaks. What
3 I am intending to do to avoid a problem is at the bottom of
4 page 23 of the final jury instructions, the Court transitions
5 into a beginning discussion of damages. That's about halfway
6 through the document. I intend at that juncture to excuse the
7 jury only for about five minutes, and then have them come
8 right back in and take their seats and we'll continue.

9 I am not excusing counsel and I'm not excusing anybody in
10 the gallery, but I am going to try to preempt any problem with
11 that issue by breaking these instructions. So I'm telling you
12 about that in advance so you won't be surprised.

13 All right. Is there anything that needs to be presented
14 to the Court from either Plaintiff or Defendant before I bring
15 in the jury and begin the Court's final jury instructions?

16 MR. THOMPSON: Nothing from Plaintiff, Your Honor.

17 THE COURT: Anything from Defendant?

18 MR. IVEY: No, Your Honor. Thank you.

19 THE COURT: All right. Let's bring in the jury.

20 (Whereupon, the jury entered the courtroom.)

21 THE COURT: Welcome back, members of the jury.
22 Please have a seat.

23 Ladies and gentlemen of the jury, you've heard all the
24 evidence in the case, and I'm now going to instruct you on the
25 law that you must apply.

1 As I told you earlier, you're each going to have your own
2 individual printed copy of these final instructions that I'm
3 giving you orally when you retire to the jury room. So you
4 are free to make notes if you'd like, but there's no real
5 requirement that you do that. Part of why I send back a
6 printed copy for each of you is in hopes that you will listen
7 carefully as I give these instructions to you orally, knowing
8 that you can look at your printed copy later if you have
9 questions.

10 Also, because of the competing claims in this case, these
11 are going to be lengthy instructions. About halfway through,
12 I'm going to break and let the members of the jury retire to
13 the jury room for a few minutes, take care of anything they
14 might need to take care of, and then come right back and we'll
15 continue. Otherwise, you might be seated for two to three
16 hours without a break.

17 After I give you these instructions orally, counsel for
18 the competing parties will present their closing arguments to
19 you.

20 Now, it's your duty to follow the law as I give it to
21 you. On the other hand and as I've said, you, the jury, are
22 the sole judges of the facts. Do not consider any statement
23 that I have made over the course of the trial or may make in
24 the course of these instructions as an indication to you that
25 I have an opinion about the facts in this case.

1 You are about to hear closing arguments from the
2 attorneys for the competing parties. Statements and arguments
3 of the attorneys are not evidence, ladies and gentlemen, and
4 they are not instructions on the law. They are intended only
5 to assist you, the jury, in understanding the evidence and the
6 parties' competing contentions.

7 A verdict form has been prepared for you, and you'll take
8 this verdict form with you to the jury room when you retire.
9 And when you've reached a unanimous agreement as to your
10 verdict, you will have your foreperson fill in the blanks in
11 the verdict form reflecting those unanimous agreed answers,
12 your foreperson will then date and sign the verdict form on
13 the last page, and you are then to notify the Court Security
14 Officer you've reached a verdict.

15 Answer the questions in the verdict form from the facts
16 as you find them to be. Do not decide who you think should
17 win this case and then answer the questions to reach that
18 result. Again, your answers and your verdict must be
19 unanimous.

20 In determining whether any fact has been proven in this
21 case, you may, unless otherwise instructed, consider the
22 testimony of all the witnesses regardless of who may have
23 called them. You may consider any stipulations of the
24 parties, and you may consider all the exhibits that have been
25 received and admitted into evidence over the course of the

1 trial, regardless of who may have introduced them.

2 You, the jury, are the sole judges of the credibility and
3 believability of all the witnesses and the weight and effect
4 to give to all the evidence. Now, in deciding the facts in
5 this case, you may have to decide which testimony to believe
6 and which testimony not to believe. You alone are to
7 determine the questions of credibility or truthfulness of the
8 witnesses.

9 In weighing the testimony of the witnesses, you may
10 consider the witness' manner and demeanor on the witness
11 stand, any feelings or interest the witness may have in the
12 outcome of the case, any prejudice or bias that the witness
13 may have, and the consistency or inconsistency of their
14 testimony, considered in the light of the circumstances. Has
15 the witness been contradicted by other evidence? Has he or
16 she made statements at other times and in other places
17 contrary to what they said on the witness stand? You, ladies
18 and gentlemen, must give the testimony of each witness the
19 amount of credibility that you think it deserves.

20 You must also keep in mind that a simple mistake does not
21 mean that a witness is intentionally not telling the truth.
22 You must consider whether any misstatement was an intentional
23 falsehood or a simple lapse in memory and what significance,
24 if any, should be attached to that testimony.

25 As I've previously told you, the attorneys in this case

1 act as advocates for their competing clients, and the
2 attorneys have a duty to raise objections when they believe
3 evidence is offered during the trial that should not be
4 admitted under the rules of the Court.

5 When the Court sustained an objection to a question
6 addressed to the witness, you must disregard the question
7 entirely, and you may draw no inference from its wording or
8 guess or speculate about what the witness would have said if
9 he or she had been permitted to answer the question.

10 On the other hand, if the objection was overruled by the
11 Court, then you must treat the answer to that question just as
12 you would treat any other answer to any other question as if
13 no objection had been made. And by allowing the testimony or
14 other evidence to be introduced over the objection of an
15 attorney, the Court did not, in so doing, indicate any opinion
16 as to the weight or effect of the evidence. Again, that's a
17 decision for you to make.

18 Now, at various times during the trial it's been
19 necessary for the Court to talk with the attorneys outside of
20 your hearing, either by having a conference here at the bench
21 or by calling a recess and talking to them while you were
22 outside of the courtroom. This happens during a trial like
23 this because there are things that arise that do not involve
24 the jury. You should not speculate or guess about what was
25 said during any discussions that took place outside of your

1 presence.

2 Now, there are two types of evidence that you may
3 consider in properly finding the truth as to the facts in this
4 case. One is direct evidence, such as the testimony of an
5 eyewitness. The other is indirect or circumstantial evidence,
6 that is, the proof of a chain of circumstances that indicates
7 the existence or non-existence of certain other facts. As a
8 general rule, the law makes no distinction between direct
9 evidence or circumstantial evidence, but simply requires that
10 you find the facts based on all the evidence presented, both
11 direct and circumstantial.

12 Now, it's possible that the parties have stipulated or
13 agreed to some facts in the case. When lawyers for both sides
14 stipulate or agree as to the existence of a fact, then you
15 must, unless otherwise instructed, accept the stipulation as
16 evidence and regard the fact as proven.

17 These facts, ladies and gentlemen, are not disputed
18 between the parties, and they are:

19 1. The subject matter jurisdiction in this Court is
20 proper.

21 2. The parties do not contest that the Court has
22 personal jurisdiction over the parties for the purpose of this
23 litigation.

24 3. On May the 10th, 2022, the United States Patent and
25 Trademark Office issued Patent No. 11,329,352, entitled

1 Secondary Battery Cell and Winding Formation System Thereof.

2 4. The effective date of the '352 Patent is August the
3 31st, 2015.

4 5. ATL, the Plaintiff, owns all the right, title, and
5 interest in and to the '352 Patent.

6 6. ATL first notified CosMX, the Defendant, of its
7 allegation regarding infringement of the '352 Patent on June
8 the 21st, 2022.

9 7. On November the 10th, 2020, the United States Patent
10 and Trademark Office issued U.S. Patent No. 10,833,363,
11 entitled Electrolyte and Electrochemical Device.

12 8. The effective filing date of the '363 Patent is
13 September the 21st, 2018.

14 9. Plaintiff ATL owns all the right, title, and interest
15 in and to the '363 Patent.

16 10. ATL first notified Defendant CosMX of its allegation
17 regarding infringement of the '363 Patent on August the 2nd,
18 2022.

19 11. On March the 30th, 2021, the U.S. Patent and
20 Trademark Office issued U.S. Patent No. 10,964,987, titled
21 Separator and Energy Storage Device.

22 12. The effective filing date of the '987 Patent is
23 April the 11th, 2018.

24 13. Plaintiff ATL owns all right, title, and interest in
25 and to the '987 Patent.

1 14. ATL first notified the Defendant CosMX of its
2 allegation regarding infringement of the '987 Patent on June
3 the 28th, 2021.

4 15. The accused products are lithium-ion battery
5 products made by Defendant CosMX.

6 16. ATL and CosMX engaged in meetings on June the 30th,
7 2021; July the 14th, 2021; July the 28th, 2021; August the
8 12th, 2021; September the 3rd, 2021; and September the 10th,
9 2021, to discuss CosMX's alleged infringement of ATL's patents
10 and potential resolution of the alleged infringement.

11 Now, during the course of the trial certain testimony has
12 been presented to you through what are called depositions. A
13 deposition is the sworn, recorded answers to questions asked
14 to a witness in advance of the trial. If a witness cannot be
15 present to testify in person, or if allowed by other limited
16 circumstances under the Rules, then the witness' testimony may
17 be presented under oath in the form of a deposition.

18 Before the trial began, the attorneys representing the
19 parties in this case questioned these deposition witnesses
20 under oath. At that time, a court reporter was present and
21 recorded their sworn testimony.

22 Deposition testimony, ladies and gentlemen, is entitled
23 to the same consideration by you as testimony given by a
24 witness in person who testifies in open court from the witness
25 stand. Accordingly, you should judge the credibility and the

1 importance of deposition testimony to the best of your
2 ability, just as if the witness had testified in open court
3 before you in person.

4 Now, while you should consider only the evidence in this
5 case, you are permitted to draw such reasonable inferences
6 from the testimony and exhibits as you feel are justified in
7 the light of common experience. Said another way, you may
8 make deductions and reach conclusions that reason and common
9 sense lead you to draw from the facts that have been
10 established by the testimony and the evidence in this case.

11 However, you should not base your decision on any
12 evidence not presented by the parties during this trial,
13 including your own personal experience with any of the
14 products that are at issue in this case.

15 Now, unless I instruct you otherwise, you may properly
16 determine that the testimony of a single witness is sufficient
17 to prove any fact, even if a greater number of witnesses may
18 have testified to the contrary, if after considering all the
19 evidence, you believe that single witness.

20 When knowledge of a technical subject may be helpful to
21 the jury, a person who has special training and experience in
22 that technical field--we call them an expert witness--is
23 permitted to state his or her opinions on those technical
24 matters to the jury. However, ladies and gentlemen, you are
25 not required to accept those opinions. As with any other

1 witness, it is solely up to you to decide whether or not to
2 rely on the testimony of expert witnesses and all the other
3 witnesses.

4 Now, certain exhibits have been shown to you over the
5 course of the trial that were simply illustrations. We call
6 these types of exhibits demonstrative exhibits. You may have
7 heard them simply referred to as a demonstrative.
8 Demonstrative exhibits are a party's depiction, picture, or
9 model to describe something involved in the trial. If your
10 recollection of the evidence differs from these
11 demonstratives, you should rely on your recollection.

12 Demonstrative exhibits are sometimes called jury aids,
13 and demonstrative exhibits themselves, ladies and gentlemen,
14 are not evidence, but a witness' testimony concerning a
15 demonstrative is evidence. These demonstrative exhibits are
16 not going to be available to you to review or consider in the
17 jury room during your deliberations.

18 Now, in any legal action, facts must be proven by a
19 required amount of evidence known as the burden of proof. The
20 burden of proof in this case is on the Plaintiff ATL for some
21 issues and is on the Defendant, CosMX, for other issues.
22 There are two burdens of proof that you will apply in this
23 case. They are the preponderance of the evidence and clear
24 and convincing evidence.

25 The Plaintiff in this case, ATL, has the burden of

1 proving patent infringement by a preponderance of the
2 evidence. ATL has the burden of proving willful patent
3 infringement by a preponderance of the evidence. ATL has the
4 burden of proving damages for any patent infringement that you
5 may find by a preponderance of the evidence. Likewise, the
6 Defendant CosMX has the burden of proving its antitrust
7 counterclaim and damages by a preponderance of the evidence.

8 I'm sorry. Let me restate that.

9 The Defendant CosMX, which you've heard throughout the
10 trial referred to as the Defendant or simply as CosMX, has the
11 burden of proving its antitrust claims by clear and convincing
12 evidence and damage for any antitrust claim violations by a
13 preponderance of the evidence.

14 A preponderance of the evidence means evidence that
15 persuades you that a claim is more probably true than not
16 true. Sometimes this is talked about as being the greater
17 weight and degree of credible testimony.

18 CosMX also has the burden of proving invalidity of ATL's
19 patent claims by clear and convincing evidence. Further,
20 CosMX also bears the burden to prove by clear and convincing
21 evidence that ATL's threat of Chinese patent litigation was
22 objectively baseless and constituted an attempt to interfere
23 directly with the business relationships of one or more
24 competitors through the use of the litigation process.

25 Clear and convincing evidence, ladies and gentlemen,

1 means evidence that produces in your mind an abiding
2 conviction that the truth of the party's factual contentions
3 are highly probable. Although proof to an absolute certainty
4 is not required, the clear and convincing evidence standard
5 requires a greater degree of persuasion than is necessary for
6 the preponderance of the evidence standard. If proof
7 establishes in your mind an abiding conviction in the truth of
8 the matter, then the clear and convincing evidence standard
9 has been met.

10 Now, as I've previously told you, these two burdens of
11 proof are not to be confused with a third and different burden
12 of proof known as beyond a reasonable doubt, which is the
13 burden of proof applied in a criminal case and which has no
14 application whatsoever in a civil case like this. Beyond a
15 reasonable doubt is a higher standard than both the
16 preponderance of the evidence and clear and convincing
17 evidence.

18 Now, as I did at the beginning of the case, I'm going to
19 first give you a summary of each side's contentions and then
20 provide you with detailed instructions on what each side must
21 prove in order to win on each of its contentions.

22 As I previously told you, there are two components in
23 this case.

24 The first component is an action for patent infringement.
25 Plaintiff ATL contends that Defendant CosMX infringes certain

1 claims of the patents-in-suit. Remember, there are three
2 United States patents at issue in this case. They are United
3 States Patent No. 11,329,352, which you've heard referred to
4 throughout the trial as the '352 Patent; U.S. Patent No.
5 10,833,363, which you've heard referred to as the '363 Patent;
6 and U.S. Patent No. 10,964,987, which you've heard referred to
7 as the '987 Patent.

8 The Plaintiff ATL contends that the Defendant CosMX
9 infringes the following claims of these three patents-in-suit:
10 claim 1 of the '352 Patent, claim 1 of the '363 Patent, and
11 claims 1 and 17 of the '987 Patent. These are the asserted
12 claims.

13 Atl contends that CosMX has infringed these asserted
14 claims by making, using, selling, or offering for sale in the
15 United States, or importing into the United States its
16 lithium-ion battery products. And I'll refer to these as the
17 accused products.

18 Atl further alleges that CosMX's infringement of the
19 asserted patents has been and was willful.

20 Atl contends that it's entitled to money damages in the
21 form of a reasonable royalty for CosMX's infringement. ATL
22 has the burden to prove these issues by a preponderance of the
23 evidence.

24 Defendant CosMX denies that it infringes any of the
25 asserted claims of the three patents-in-suit. CosMX denies

1 that it makes, uses, offers for sale, sells into the United
2 States, or imports into the United States any accused product
3 that infringes any of the asserted claims.

4 Cosmx also denies that any alleged infringement has been
5 and was willful.

6 Cosmx also denies that it owes ATL any money damages.

7 CosMX contends that claim 1 of the '363 Patent and claims
8 1 and 17 of the '987 Patent are invalid as being anticipated
9 by the prior art. CosMX also contends that claim 1 of the
10 '352 Patent is invalid as being rendered obvious by the prior
11 art.

12 Atl denies that any of ATL's asserted claims are invalid.
13 CosMX has the burden to prove invalidity by clear and
14 convincing evidence.

15 Invalidity and infringement, ladies and gentlemen, are
16 separate and distinct issues, and your job is to decide
17 whether CosMX has infringed the asserted claims and whether
18 those claims are invalid. If you decide that any asserted
19 claim has been infringed and is not invalid, you will then
20 need to decide the amount of money damages, if any, to be
21 awarded to ATL to compensate it for the infringement.

22 If you decide that there has been any infringement and it
23 was willful, that decision about willfulness should not affect
24 any damages award that you might make. The Court will take
25 willfulness into account later if you find it.

1 Now, this is the first component in this case.

2 There is a second component in this case where the
3 Defendant CosMX asserts several affirmative claims against
4 ATL, and I told you at the beginning of the case, these are
5 called counterclaims.

6 CosMX contends that ATL threatened CosMX with litigation
7 involving certain Chinese patents. These threats, according
8 to CosMX, were not made out of a genuine concern for
9 legitimate patents, but instead were meant to damage CosMX and
10 impede CosMX's ability to compete.

11 In particular, CosMX contends the threats were timed to
12 interfere with and delay CosMX's planned initial public
13 offering of its shares on the Shanghai Stock Exchange, what
14 you heard to throughout the trial as CosMX's IPO. CosMX
15 alleges the threats were effective in achieving their intended
16 purpose and that CosMX's IPO was delayed by approximately two
17 months due to the actions of ATL.

18 Cosmx claims that that delay resulted in CosMX raising
19 significantly less money than it otherwise would have raised
20 had the IPO not been delayed, and that that caused CosMX to
21 incur significant additional expenses to get the IPO approved.

22 CosMX further alleges that ATL used patent litigation
23 threats as a means of attempting to coerce CosMX into agreeing
24 with ATL for a no-poach agreement by which CosMX and ATL would
25 agree that CosMX would not hire highly-skilled,

1 technologically-specialized ATL employees.

2 CosMX contends that ATL's actions violated federal
3 antitrust law, sometimes referred to in this case as Section 2
4 of the Sherman Act. Specifically, ATL contends that ATL's
5 actions -- CosMX contends that ATL's actions constituted an
6 attempted monopolization of the relevant market for
7 lithium-ion batteries used in smartphones and the relevant
8 market for a lithium-ion batteries used in laptops in
9 violation of Section 2 of the Sherman Act.

10 ATL denies that it has violated Section 2 of the Sherman
11 Act. ATL contends that it did not offer a no-poach agreement,
12 but instead complained that CosMX was hiring engineering
13 personnel away from ATL specifically to gain access to ATL's
14 confidential information and trade secrets, and that this
15 related to its reasonable belief that CosMX was infringing its
16 U.S. and Chinese patents. ATL further contends that none of
17 its actions actually did or even could have hurt CosMX's
18 competitive position.

19 Now, if you decide that ATL has violated Section 2 of the
20 Sherman, you'll then need to decide on the amount of money
21 damages, if any, that should be awarded to CosMX as
22 compensation for that alleged violation.

23 And this is the second component in this case.

24 Now, before you can decide many of these issues, you'll
25 need to understand the role of the patent claims. The patent

1 claims, ladies and gentlemen, are those numbered sentences at
2 the end of each patent.

3 The claims are important because it's the words of the
4 claims that define what a patent covers. The figures and the
5 text in the rest of the patent provide a description and/or
6 examples of the invention and they provide a context for the
7 claims, but it is the claims themselves that define the
8 breadth of the patent's coverage.

9 Each claim is effectively treated as if it were a
10 separate patent, and each claim may cover more or less than
11 any other claim. Therefore, what a patent covers depends, in
12 turn, on what each of its claims covers.

13 You will first need to understand what each claim covers
14 in order to decide whether or not there is infringement of the
15 claim and to decide whether or not the claim is invalid. Now,
16 the law says that it's my job to define the terms of the
17 claims and it's your job to apply my definitions to the issues
18 that you are asked to decide in this case.

19 As a result and as I've explained to you at the beginning
20 of the case, I've already determined the meaning of certain
21 claim language and I have provided those definitions or
22 constructions to you in your juror notebooks. You must accept
23 and apply my definitions to this language -- to this claim
24 language as being correct. It's your job to take these
25 definitions or constructions, they're sometimes called, and

1 apply them to the issues that you are deciding, including the
2 issues of infringement and invalidity.

3 Now, for any claim language which I have not provided you
4 with a definition or construction, you should apply the plain
5 and ordinary meaning of that language.

6 You should also disregard any evidence presented to you
7 at trial that contradicts or is inconsistent with these
8 constructions or definitions that I have given you. For claim
9 limitations or language -- for claim limitations or claim
10 language that I have not construed--that is, limitations or
11 language I have not interpreted or defined for you--you are to
12 use, as I've told you, the plain and ordinary meaning of that
13 language as understood by one of ordinary skill in the art,
14 which is to say, in the field of the technology of the patent,
15 at the time of the claimed invention or the alleged invention.

16 The meaning of the words in the patent claims must be the
17 same when deciding both infringement and invalidity. And
18 you've been provided with copies of each of the three asserted
19 patents inside your juror notebooks, and you may refer to them
20 and consider them during your deliberations.

21 Now, several times in these instructions I will refer and
22 have referred to a person of ordinary skill in the field of
23 the invention, or a person of ordinary skill in the art. In
24 deciding the level of ordinary skill in the field, you should
25 consider all the evidence introduced at trial, including but

1 not limited to: the levels of education and experience of the
2 inventor or other persons actively working in the field; the
3 types of problems encountered in the field; the previous
4 solutions to those problems; and the rapidity with which
5 innovations are made; and the sophistication of the
6 technology.

7 Now, the claims, ladies and gentlemen, are intended to
8 define in words the boundaries of the inventor's rights. Only
9 the claims of the patent can be infringed. Neither the
10 written description, the specification, the drawings, the
11 figures, anything else, can be infringed. Only the claims can
12 be infringed, and each of the claims must be considered
13 individually.

14 I'll now explain to you how a claim defines what it
15 covers.

16 A claim sets forth in words a set of requirements. Each
17 claim sets forth its requirements in a single sentence. If a
18 product satisfies each of these requirements, then it is
19 covered by the claim. And there can be several claims in a
20 patent, and each claim may be narrower or broader than any
21 other claim by setting forth more or fewer requirements.

22 The coverage of a patent is assessed on a claim-by-claim
23 basis. And in patent law, the requirements of a claim are
24 often referred to as the claim elements or the claim
25 limitations. Those are the same thing. When a product meets

1 all the requirements of a claim, all the claim limitations,
2 all the claim elements, the claim is said to cover that
3 product, and that product is said to fall within the scope of
4 that claim.

5 In other words, ladies and gentlemen, a claim covers a
6 product where each of the claim elements or limitations is
7 present in that product. If a product is missing even one
8 limitation or element of a claim, the product is not covered
9 by the claim. And if the product is not covered by the claim,
10 the product cannot infringe the claim.

11 Now, the beginning portion or preamble of a claim often
12 uses the word 'comprising'. The word 'comprising' when used
13 in the preamble of a claim means including but not limited to
14 or containing but not limited to. When comprising is used in
15 a preamble, if you decide that an accused product includes all
16 of the requirements of that claim, the claim is infringed, and
17 this is true even if the accused product contains additional
18 or extra elements.

19 For example, a claim to a table comprising a tabletop,
20 legs, and glue would be infringed by any table that includes a
21 tabletop, legs, and glue, even if the table also contains
22 other structures such as leaves that would expand the size of
23 the tabletop or wheels that would go on the ends of the legs.

24 Now, this case involves two types of patent claims:
25 independent claims and dependent claims. Claim 1 of the '352

1 Patent, claim 1 of the '363 Patent, and claim 1 of the '987
2 Patent are independent patent claims. Claim 17 of the '987
3 Patent is a dependent patent claim.

4 An independent claim, ladies and gentlemen, sets forth
5 all the requirements that must be met in order to be covered
6 by that claim. It is not necessary to look at any other claim
7 to determine what an independent claim covers.

8 On the other hand, a dependent claim does not itself
9 recite all the requirements of a claim, but refers to another
10 claim for some of its requirements. In this way, the
11 dependent claim depends on another claim. A dependent claim
12 incorporates all the requirements of the claim to which it
13 refers, or as we sometimes say, from which it depends, and
14 then the dependent claim adds its own additional requirements.

15 So to determine what an dependent claim covers, it's
16 necessary to look at both the dependent claim itself and any
17 other claim to which it refers or from which it depends. A
18 product that meets all the requirements of both a dependent
19 claim and the claim to which that dependent claim is covered
20 by that dependent claim.

21 If a person or a corporation makes, uses, sells, or
22 offers to sell within the United States, or imports into the
23 United States what is covered by a patent claim without the
24 patent owner's permission, that person or corporation is said
25 to infringe the patent.

1 In reaching your decision on infringement, keep in mind,
2 ladies and gentlemen, that only the claims of a patent can be
3 infringed, and you must compare the asserted patent claims as
4 I have construed them for you, to the accused products to
5 determine whether or not there is or is not infringement. And
6 this is the only correct comparison--comparing the patent
7 claims to the accused products.

8 You should not compare the accused products with any
9 specific examples set out in the patent, with the prior art,
10 or with ATL's own products in reaching your decision on
11 infringement. You should also not compare ATL's patents to
12 CosMX's patents or patent applications when deciding whether
13 or not CosMX's products infringe ATL's patents.

14 In deciding infringement, the only correct comparison is
15 between the accused products and the limitations of the claims
16 as the Court has construed them. You must reach your decision
17 as to each assertion of infringement based on my instructions
18 about the meaning and scope of the claims, the legal
19 requirements for infringement, and the evidence presented to
20 you by the competing parties.

21 I'll now instruct you on the specific rules that you must
22 follow to determine whether ATL has proven that CosMX has
23 directly infringed one or more of the patent claims involved
24 in this case.

25 A patent can be directly infringed even if the alleged

1 direct infringer did not have knowledge of the patent and
2 without the direct infringer knowing that what it did was
3 infringement of the claim. A patent can also be directly
4 infringed even though the accused direct infringer believed in
5 good faith that what it did was not infringement of the
6 patent. Infringement does not require proof that any party
7 copied its product from the asserted claims.

8 You must determine separately for each asserted claim
9 whether or not there is infringement. However, if you find
10 that an independent claim on which other claims depend is not
11 infringed, there cannot be infringement of any dependent claim
12 that refers directly or indirectly to that independent claim.

13 On the other hand, if you find that an independent claim
14 has been infringed, you must still decide, separately, whether
15 the product meets the additional requirements of any claims
16 that depend from that independent claim; that is, whether
17 those claims also have been infringed. A dependent claim,
18 again, includes all the requirements of any of the claims to
19 which it refers plus the additional requirements set forth
20 within the dependent claim itself.

21 Now, in order to prove direct infringement of a patent
22 claim, ATL must show by a preponderance of the evidence that
23 the accused products include each and every limitation or
24 element of the claim.

25 In determining whether the accused products directly

1 infringe a patent claim in this case, you must compare the
2 accused products with each and every one of the requirements
3 or limitations of that claim to determine whether the accused
4 product contains each and every requirement or limitation
5 recited in the claim. An accused product infringes a claim if
6 it is reasonably capable of satisfying the claim elements,
7 even though it may also be capable of non-infringing modes of
8 operation.

9 A claim requirement is literally present if it exists in
10 an accused product just as it is described in the claim
11 language, either as I have explained or construed that
12 language for you, or if I did not construe it, as it would be
13 understood by its plain and ordinary meaning by a person of
14 ordinary skill in the art. If an accused product omits any
15 element recited in a claim, then you must find that the
16 product in question does not literally infringe that claim.

17 So long as an accused product has each and every one of
18 the claim requirements, infringement of that claim is shown,
19 even if the product contains additional features or elements
20 that are not required by the claims.

21 I'll now instruct you on the issue of indirect
22 infringement.

23 In this case, ATL has accused CosMX of indirect
24 infringement by actively inducing its customers to directly
25 infringe the asserted claims of the asserted patents. As with

1 direct infringement, you must determine whether there has been
2 active inducement on a claim-by-claim basis.

3 Cosmx is liable for induced infringement of a claim only
4 if ATL proves by a preponderance of the evidence that:

5 1. Acts have been carried out by CosMX customers that
6 directly infringe that claim;

7 2. CosMX has taken action during the time the asserted
8 patent was in force, intending to cause the infringing acts by
9 its customers; and

10 3. CosMX has been aware of the asserted patents and has
11 known that the acts of its customers constitute infringement
12 of the asserted patents, or was willfully blind to that
13 infringement.

14 Willful blindness, ladies and gentlemen, is established
15 if CosMX believed there was a high probability that the acts,
16 if taken, would constitute infringement of the asserted
17 claims, but deliberately avoided confirming that belief.

18 To establish induced infringement, it is not sufficient
19 that someone else directly infringes a claim, nor is it
20 sufficient that a company accused of inducing another's direct
21 infringement merely had notice or knowledge of an asserted
22 patent or had been aware of the acts by another that allegedly
23 constitute direct infringement.

24 And the mere fact that the company accused of inducing
25 another's direct infringement had known or should have known

1 that there was a substantial risk that someone else's acts
2 would infringe is not sufficient. Rather, in order to find
3 inducement, you must find that CosMX specifically intended or
4 was willfully blind to that infringement.

5 ATL also contends that CosMX has willfully infringed the
6 patents-in-suit. If you decide that CosMX has infringed any
7 of the asserted claims, you must go on and address the issue
8 of whether or not that infringement was willful. ATL has the
9 burden of proving willful infringement by a preponderance of
10 the evidence.

11 You may not determine that infringement was willful just
12 because CosMX knew of the asserted patents and infringed them.
13 You may find that CosMX willfully infringed if you find that
14 CosMX deliberately or intentionally infringed the asserted
15 patents.

16 You may find that CosMX's actions were willful if CosMX
17 acted in reckless or callous disregard of, or with
18 indifference to, the rights of ATL. A defendant is
19 indifferent to the rights of another when it proceeds in
20 disregard of a high or excessive danger of infringement that
21 is known to it or was apparent to a reasonable person in its
22 position.

23 To determine whether CosMX acted willfully, consider all
24 the facts and assess CosMX's knowledge at the time of the
25 challenged conduct. Facts that may be considered include:

1 1. Whether or not CosMX acted consistently with the
2 standards of behavior for its industry;

3 2. Whether or not CosMX intentionally copied a product
4 of ATL that is covered by the asserted patents;

5 3. Whether or not CosMX reasonably believed that it did
6 not infringe or that the asserted claims of the patents were
7 invalid;

8 4. Whether or not CosMX made a good-faith effort to
9 avoid infringing the asserted patents, for example, whether
10 CosMX attempted to design around the asserted patents; and

11 5. Whether or not CosMX tried to cover up its
12 infringement.

13 You may find that CosMX's actions were deliberate or
14 intentional if CosMX was willfully blind to ATL's patent
15 rights.

16 Your determination, ladies and gentlemen, of willfulness
17 should incorporate the totality of the circumstances based on
18 the evidence presented during this trial. Willfulness can be
19 established by circumstantial evidence. And if you decide
20 that any infringement you have found was willful, that
21 decision should not affect any damages that you might award.
22 The Court, as I told you, will take willfulness into account
23 later, if you find it.

24 I'll now instruct you on the rules that you must apply in
25 deciding whether or not CosMX has proven that any asserted

1 claims of the asserted patents are invalid.

2 An issued United States patent is accorded a presumption
3 of validity based on the presumption that the United States
4 Patent and Trademark Office, which you've heard referred to
5 during the trial as the PTO, or the Patent Office, acted
6 correctly in issuing the patent. This presumption of validity
7 extends to all issued United States patents.

8 In order to overcome this presumption, CosMX must
9 establish by clear and convincing evidence that a claim is
10 invalid. Like infringement, ladies and gentlemen, invalidity
11 is determined on a claim-by-claim basis. And you must
12 determine separately for each claim whether that claim is
13 invalid. If one claim of a patent is invalid, this does not
14 necessarily mean that any other claim is invalid.

15 Now, claims are construed in the same way for determining
16 infringement as for determining invalidity, and you must apply
17 the claim language consistently and in the same manner for
18 issues of infringement as for the issues of invalidity. And
19 in making your determination as to invalidity, you must
20 consider each claim separately.

21 A previous device, system, method, publication, or patent
22 that predates the claimed invention is generally called prior
23 art, and may include items that disclose the claimed invention
24 or elements of the claimed invention and were in public use,
25 on sale, or otherwise available to the public. Prior art may

1 be authored or created by anyone. In evaluating the prior art
2 to determine whether an invalidity defense has been proven by
3 clear and convincing evidence, you may consider whether that
4 prior art was or was not before the PTO.

5 The Defendant, CosMX, contends that the asserted claims
6 of the '987 and the '363 Patents are invalid because the
7 inventions defined in those claims were on sale before the
8 effective filing dates of the '987 and '363 Patents.

9 A claim is invalid if, before the effective filing date,
10 an embodiment of the claimed invention was both (1) the
11 subject of a commercial sale or offer for sale, and (2) ready
12 for patenting. CosMX must show both requirements by clear and
13 convincing evidence.

14 A commercial offer for sale was made if another party
15 could make a binding contract by accepting the offer. An
16 invention was subject to an offer for sale if the claimed
17 invention was embodied in an actual product and that product
18 was commercially sold or offered for sale, even if it was done
19 confidentially. It is not required that a sale was actually
20 made.

21 The invention must also have been ready for patenting at
22 the time of the sale or offer for sale. The claimed invention
23 is ready for patenting when there is reason to believe that it
24 would work for its intended purpose.

25 An invention is ready for patenting either when it is

1 reduced to practice or when the inventor has prepared drawings
2 or other descriptions of the invention that were sufficiently
3 specific to enable a person of ordinary skill in the art to
4 practice the invention. An invention was reduced to practice
5 when it has been constructed within the scope of the patent
6 claims and determined that it works for its intended purpose.

7 Now, the Defendant CosMX also contends that the asserted
8 claims are invalid because the invention defined in those
9 claims were described in printed publications before the
10 effective filing dates. A patent claim is invalid if a
11 publication printed before the effective filing date was
12 maintained in some tangible form, such as printed pages,
13 electronic files, microfilm, photographs, internet
14 publications, or photocopies, and was sufficiently accessible
15 to persons interested in the subject matter of its contents.

16 Information is publicly accessible if it was distributed
17 or otherwise made available such that persons interested and
18 ordinarily skilled in the subject matter exercising reasonable
19 diligence could locate it. It's not necessary that the
20 printed publication to have -- it's not necessary for the
21 printed publication to have been available to every member of
22 the public.

23 The disclosure of the claimed invention in the printed
24 publication must be complete enough to enable one of ordinary
25 skill in the art to use the invention without undue

1 experimentation. In determining whether the disclosure is
2 enabling, you should consider what would have been within the
3 knowledge of a person of ordinary skill in the art as of the
4 effective filing date, and you may consider evidence that
5 sheds light on the knowledge that such a person would have
6 had.

7 I'll now instruct you on how to determine whether any of
8 the asserted claims of the asserted patents are invalid as
9 anticipated.

10 In order for someone to be entitled to a patent, the
11 invention must actually be new, and the inventor must not have
12 lost his or her rights by delaying the filing of an
13 application claiming the invention. In general, ladies and
14 gentlemen, inventions are new when the identical method has
15 not been used or disclosed before.

16 CosMX contends that the asserted claims of the '363 and
17 the '987 Patents are invalid because the claimed inventions
18 are not new. In other words, CosMX contends that the patents
19 are anticipated by the prior art.

20 Anticipation requires that all the requirements of a
21 patent claim be disclosed in a single prior art reference.
22 Also, the single prior art reference must disclose all
23 elements of the claim arranged or combined as the same way as
24 in the claim as the claim has been construed or interpreted by
25 the Court.

1 Cosmx must prove by clear and convincing evidence that an
2 asserted patent claim was anticipated by the prior art
3 reference. Anticipation must be determined on a
4 claim-by-claim basis.

5 To anticipate the invention, the prior art does not have
6 to use the same words as in the claim, but all the
7 requirements of the claim must have been disclosed, either
8 stated expressly or implied, to a person having ordinary skill
9 in the art in the technology of the invention, so that looking
10 at that one reference, that person could make and use the
11 claimed invention without undue experimentation.

12 Keep in mind that CosMX may not establish anticipation by
13 arguing that the accused products practice the prior art, or
14 by comparing the accused products to a prior art reference.
15 An item of prior art may anticipate without explicitly
16 disclosing a feature of the claimed invention if that missing
17 characteristic was necessarily present, or inherent, in the
18 single anticipating reference.

19 In this case, CosMX also contends that claim 1 of the
20 '352 Patent is invalid as being obvious.

21 Even though an invention may not have been identically
22 disclosed or identically described in a single prior art
23 reference before it was made by an inventor, in order to be
24 patentable, the invention must not have been obvious to a
25 person of ordinary skill in the field of the technology of the

1 patent at the time the invention was made.

2 CosMX has the burden of establishing obviousness by
3 showing by clear and convincing evidence that the claimed
4 invention would have been obvious to persons having ordinary
5 skill in the art at the time the invention was made.

6 In determining whether a claimed invention is obvious,
7 you must consider the level of ordinary skill in the field
8 that someone would have had at the time the invention was
9 made, the scope and content of the prior art, and any
10 differences between the prior art and the claimed invention.

11 Keep in mind, ladies and gentlemen, that the existence of
12 each and every element of the claimed invention in the prior
13 art does not necessarily prove obviousness. Most, if not all,
14 inventions rely on the building blocks of prior art. The
15 skill of the actual inventor is not necessarily relevant
16 because inventors may possess something that distinguishes
17 them from persons having ordinary skill in the art.

18 Now, in considering whether the claimed invention was
19 obvious, you must first determine the scope and content of the
20 prior art. The scope and content of the prior art includes at
21 least prior art as in the same field as the claimed invention.
22 It also includes prior art from different fields that a person
23 of ordinary skill in the art would have considered when trying
24 to solve the problem that is addressed by the invention.

25 Further, teachings, suggestions, and motivations may also

1 be found within the knowledge of a person with ordinary skill
2 in the art, including inferences and creative steps that a
3 person of ordinary skill in the art would employ. A person of
4 ordinary skill may be able to fit the teachings of multiple
5 pieces of prior art together like the pieces of a puzzle. The
6 person of ordinary skill in the art would have the capability
7 and understanding of the scientific and engineering principles
8 applicable to the prior art.

9 In considering whether a claimed invention is obvious,
10 you may but are not required to find obviousness if you find
11 at the time of the claimed invention there was a reason that
12 would have prompted a person having ordinary skill in the
13 field to combine the known elements in a way the claimed
14 invention does, taking into account such factors as:

15 1. Whether the claimed invention was merely the
16 predictable result of using prior art elements according to
17 their known function;

18 2. Whether the claimed invention provides an obvious
19 solution to a known problem in the relevant field;

20 3. Whether the prior art teaches or suggests the
21 desirability of combining elements in the claimed invention;

22 4. Whether the prior art teaches away from combining
23 elements in the claimed invention;

24 5. Whether it would have been obvious to try the
25 combination of elements in the claimed invention, such as when

1 there is a design need or market pressure to solve a problem
2 and there are a finite number of identified, predictable
3 solutions; and

4 6. Whether the change resulted more from design
5 incentives or other market forces.

6 To find the invention as obvious, you must find that the
7 prior art provided a person having ordinary skill in the field
8 a reasonable expectation of success. That something may have
9 been obvious to try is not sufficient in fields related to
10 unpredictable technologies.

11 Now, the determining whether the claimed invention was
12 obvious, consider each claim separately. Do not use
13 hindsight; consider only what was known at the time of the
14 invention. In other words, you should not consider what a
15 person of ordinary skill in the art would know today or what
16 has been learned from the teachings of the '352 Patent.

17 In making these assessments, you should take into account
18 any objective evidence, sometimes called secondary
19 considerations, that may have existed at the time of the
20 invention, and afterwards, and may shed light on the
21 obviousness or not of the claimed invention.

22 Now, the following are possible secondary considerations,
23 but it's up to you, ladies and gentlemen, to determine whether
24 secondary considerations of non-obviousness exist at all.
25 These are:

1 1. Whether the invention was commercially successful as
2 the result of the merits of the claimed invention rather than
3 the result of design needs or market pressure, advertising, or
4 similar activities;

5 2. Whether the invention satisfied a long-felt need;

6 3. Whether the inventor proceeded contrary to accepted
7 wisdom in the field;

8 4. Whether others tried, but failed, to solve the
9 problem solved by the claimed invention;

10 5. Whether others invented the invention at roughly the
11 same time;

12 6. Whether others copied the claimed invention;

13 7. Whether others accepted licenses under the
14 patents-in-suit because of the merits of the claimed
15 invention;

16 8. Whether the claimed invention achieved unexpected
17 results;

18 9. Whether others in the field praised the claimed
19 invention;

20 10. Whether there were changes or related technologies
21 or market needs contemporaneous with the invention; and

22 11. Whether persons having ordinary skill in the art at
23 the time of the invention expressed surprise or disbelief
24 regarding the invention.

25 These factors are relevant only if there is a connection

1 or a nexus between the factors and what differentiates the
2 claimed invention from the prior art. ATL has the burden of
3 establishing this connection or nexus.

4 Moreover, even if you conclude that some of the above
5 indicators of objective evidence have been satisfied, those
6 factors should be considered along with all the other evidence
7 in the case in determining whether CosMX has proven that the
8 claimed invention would have been obvious.

9 In support of obviousness, you may also consider whether
10 others independently invented the claimed invention before or
11 at about the same time as the named inventor thought of it.
12 In making these determinations a person of ordinary skill uses
13 simple common sense and can rely upon the inferences and
14 creative steps that a person of ordinary skill in the art
15 would employ.

16 Also, CosMX does not need to show that one of ordinary
17 skill would actually have combined the physical structures of
18 two references. One need only combine the teachings.

19 Remember, and as stated earlier, that prior art is not
20 limited to patents and published materials, but includes the
21 general knowledge that would have been available at the time
22 to one of ordinary skill in the field of the invention. If
23 you find that CosMX has proven the obviousness of a claim by
24 clear and convincing evidence, then you must find that that
25 claim is invalid.

1 Now, at this point, ladies and gentlemen, we're going too
2 take a short break. I'm going to allow you to retire to the
3 jury room, and in about five minutes I'll have you back and
4 continue with these final jury instructions.

5 The jury's excused to the jury room.

6 (Whereupon, the jury left the courtroom.)

7 THE COURT: Be seated, please.

8 MR. ANDERSON: Your Honor, can I raise an issue in
9 the instructions?

10 THE COURT: In the middle of my instructions, Mr.
11 Anderson?

12 MR. ANDERSON: Yes, Your Honor.

13 THE COURT: You believe this is timely? We had an
14 informal charge conference and a formal charge conference.

15 MR. ANDERSON: I think what the Court said on the
16 burden of proof differs from what we talked about this morning
17 on the antitrust counterclaim.

18 The Court said that on the substantive antitrust claim
19 the burden was also clear and convincing in addition to the
20 *Noerr* issue. So the Court has put a second clear and
21 convincing evidence, and that was not anything the parties
22 ever discussed. The parties were always in agreement that the
23 antitrust -- the merits of the antitrust claim, the elements
24 of that is a preponderance standard. It's the threshold
25 question, *Noerr* question, that has the clear and convincing

1 evidence.

2 So if you look at the verdict form, there's Question 5
3 which is the *Noerr* question, which is a clear and convincing
4 evidence based on the Court's rulings. But what the Court
5 told the jury this morning was that essentially when they
6 answer Question 6, that's also clear and convincing, and that
7 has never been the position of any of the parties.

8 THE COURT: Do you have a response to that, Mr.
9 Wolfson?

10 MR. WOLFSON: I believe they're right, Your Honor.
11 But the rest of the instructions that you are going to read I
12 believe are clear when you get to the substance of the
13 antitrust claims, that it is by preponderance of the evidence.
14 But it was the statement that you changed on the fly to clear
15 and convincing evidence believing, I suspect, that it was a
16 mistake in the writing.

17 We do agree that the substance of the antitrust claims
18 are preponderance but that you will instruct them as to that
19 and also that the verdict form says preponderance for the
20 substantive elements if they can get past the *Noerr-Pennington*
21 defense.

22 THE COURT: All right. Take your copy of the final
23 jury instructions and refer me to the page and line where you
24 believe that was a mistake -- a misstatement.

25 MR. ANDERSON: It is page 6, Your Honor. The

1 paragraph that begins, Likewise the Defendant has the burden
2 of proving its antitrust claim and damages by a preponderance
3 of the evidence, was what we had this morning. In the
4 transcript it shows the Court said, Let me restate that. The
5 Defendant CosMX, which you've heard throughout the trial
6 referred to as the defendant or simply as CosMX, has the
7 burden of proving its antitrust claims by clear and convincing
8 evidence.

9 THE COURT: All right. I will correct that on the
10 record with the jury when they return before I proceed with
11 the balance of my instructions.

12 MR. ANDERSON: Thank you, Your Honor.

13 (Pause in proceedings.)

14 THE COURT: Mr. Richardson, will you check on the
15 jury, and if they're ready to come back in, bring in the jury,
16 please.

17 THE COURT SECURITY OFFICER: A couple of minutes,
18 sir.

19 THE COURT: Just let me know when they're ready.

20 THE COURT SECURITY OFFICER: Yes, sir.

21 THE COURT: Let's go off the record.

22 (Off the record.)

23 THE COURT: Let's go back on the record.

24 THE COURT SECURITY OFFICER: We're ready, Your
25 Honor.

1 THE COURT: Bring them in.

2 (Whereupon, the jury entered the courtroom.)

3 THE COURT: Please be seated.

4 Before I proceed with the remainder of my instructions,
5 ladies and gentlemen, I need to correct one unintentional
6 misstatement.

7 I told you earlier that the Defendant CosMX has the
8 burden of proving its antitrust claim and damages by clear and
9 convincing evidence. That was a misstatement. CosMX, the
10 Defendant, has the burden of proving its antitrust claim and
11 damages by a preponderance of the evidence. I'd like to
12 correct that in your minds.

13 Now I'll continue with the remainder of my instructions
14 where we stopped briefly for a break.

15 If you find that CosMX has infringed any valid claim of
16 the asserted patents, you must then consider what amount of
17 damages, if any, to award to ATL, the Plaintiff.

18 I'll now instruct you about the measure of damages, but
19 by instructing you on damages, I am not suggesting which party
20 should win this case on any issue. If you find that CosMX has
21 not infringed any valid claim of the patents-in-suit, then ATL
22 is not entitled to any patent damages.

23 ATL has the burden to establish the amount of its damages
24 by a preponderance of the evidence. In other words, you
25 should award only those damages that ATL establishes that it

1 more likely than not suffered as a result of CosMX's
2 infringement. While ATL is not required to prove the amount
3 of its damages with mathematical precision, it must prove them
4 with reasonable certainty. And ATL is not entitled to damages
5 that are remote or that are only speculative.

6 The damages that you might award, if any, are meant to
7 compensate ATL for any infringement that you may find. You
8 must not award ATL more damages than are adequate to
9 compensate it for the infringement. You also must not award
10 any additional amount for the purpose of punishing CosMX or
11 setting an example.

12 I'll now instruct you on how to calculate reasonable
13 royalty damages.

14 A royalty, ladies and gentlemen, is a payment made to a
15 patent holder in exchange for the right to make, use, or sell
16 the claimed invention. A reasonable royalty is the amount of
17 royalty payment that a patent holder and the alleged infringer
18 would have agreed to in a hypothetical negotiation taking
19 place at a time prior to when the infringement first began.

20 In considering this hypothetical negotiation, you should
21 focus on what the expectations of the patent holder and the
22 alleged infringer would have been had they entered into an
23 agreement at that time, and had they acted reasonably in their
24 negotiations. In determining this, you must assume that both
25 parties believed the patent was valid and infringed and that

1 both parties were willing to enter into an agreement.

2 The reasonable royalty that you determine must be a
3 royalty that would have resulted from the hypothetical
4 negotiation and not simply a royalty that either party would
5 have preferred.

6 Evidence of things that have happened after the
7 infringement first began can be considered in evaluating the
8 reasonable royalty only to the extent that the evidence aids
9 in assessing what royalty would have resulted from a
10 hypothetical negotiation.

11 Although evidence of the actual profits of an
12 alleged infringer -- that an alleged infringer made may be
13 used to determine the anticipated profits at the time of the
14 hypothetical negotiation, the royalty may not be limited or
15 increased based on the actual profits the alleged infringer
16 made.

17 The law requires that any royalty awarded to ATL
18 correspond to the value of the alleged inventions within the
19 accused products, as distinct from other unpatented features
20 of the accused products. This is particularly true where the
21 accused products have multiple features and multiple
22 components not covered by the patent or where the accused
23 products work in conjunction with other non-patented items.

24 If unpatented features contribute to the accused
25 products, you must apportion that value to exclude any value

1 attributable to unpatented features. You must determine an
2 appropriate royalty rate and an appropriate royalty base that
3 reflect the value attributable to the patented invention
4 alone.

5 In determining the reasonable royalty, you should
6 consider all the facts known and available to the parties at
7 the time the infringement began.

8 Some of the kinds of factors that you may consider in
9 making your determination are:

10 1. The royalties received by the patentee for licensing
11 of the patents-in-suit, proving or tending to prove an
12 established royalty;

13 2. The rates paid by the licensee [sic] for the use of
14 other patents comparable to the patents-in-suit. Comparable
15 license agreements include those covering the use of the
16 claimed invention or similar technology;

17 3. The nature and scope of the license, as exclusive or
18 non-exclusive, or as restricted or non-restricted in terms of
19 territory or with respect to whom the manufactured product may
20 be sold;

21 4. The licensor's established policy and marketing
22 program to maintain its patent exclusivity by not licensing
23 others to use the invention or by granting licenses under
24 special conditions designed to preserve that exclusivity;

25 5. The commercial relationship between the licensor and

1 licensee, such as whether they are competitors in the same
2 territory in the same line of business;

3 6. The effect of selling the patented specialty in
4 promoting sales of other products of the licensee, the
5 existing value of the invention to the licensor as a generator
6 of sales of his non-patented items, and the extent of such
7 derivative or convoyed sales;

8 7. The duration of the patent and the term of the
9 license;

10 8. The established profitability of the product made
11 under the patents, its commercial success, and its current
12 popularity;

13 The utility and advantages -- this is 9. The utility and
14 advantages of the patented property over the old modes or
15 device, if any, that had been used for working out similar
16 results;

17 10. The nature of the patented invention, the character
18 of the commercial embodiment of it as owned and produced by
19 the licensor, and the benefits to those who have used the
20 invention;

21 11. The extent to which the infringer has made use of
22 the invention and any evidence probative of the value of that
23 use;

24 12. The portion of the profit or of the selling price
25 that may be customary in the particular business or in

1 comparable businesses to allow for the use of the invention or
2 analogous inventions;

3 13. The portion of the realizable profits that should be
4 credited to the invention as distinguished from non-patented
5 elements, the manufacturing process, business risks, or
6 significant features or improvements added by the infringer;

7 14. The opinion and testimony of qualified experts; and

8 15. The amount that a licensor (such as the patentee)
9 and a licensee (such as the infringer) would have agreed upon
10 at the time the infringement began if both had been trying
11 reasonably and voluntarily to reach an agreement; that is, the
12 amount which a prudent licensee who desired, as a business
13 proposition, to obtain a license to the patented invention
14 would have been willing to pay as a royalty and yet be able to
15 make a reasonable profit and which amount would have been
16 acceptable to a prudent patentee who was willing to grant a
17 license.

18 You may have heard these factors referred to over the
19 course of the trial as the *Georgia-Pacific* factors. No one of
20 these factors is dispositive, ladies and gentlemen, and you
21 can and you should consider the evidence that's been presented
22 to you in this case on each of these factors. You may also
23 consider any other factors which, in your mind, would have
24 increased or decreased the royalty the alleged infringer would
25 have been willing to pay and the patent owner would have been

1 willing to accept, acting as normally prudent business people.

2 Now, the damages period for each asserted patent begins
3 on the date that CosMX received actual notice of the -- or
4 that the asserted patent -- actual notice of that asserted
5 patent, and the alleged infringement of that patent, and the
6 damages period ends with this trial.

7 If you award damages, the amount you award must reflect
8 damages for this infringement during this period only. You
9 should not award any future damages. For the '352 Patent, the
10 damage period begins on June the 21st, 2022, and ends today.
11 For the '363 Patent, the damages period begins on August the
12 2nd, 2022, and ends today. For the '987 Patent, the damages
13 period begins on June the 28th, 2021, and ends today. The
14 damages you award, if any, must be for conduct occurring
15 during these time periods.

16 Now, ladies and gentlemen, these are the instructions
17 related to the patent claims that relate to the first
18 component of this case as I've described it to you.

19 I'm now going to turn to the second component of this
20 case, which is CosMX's counterclaim that ATL has violated
21 federal antitrust laws.

22 The purpose of federal antitrust law is to preserve free
23 and unfettered competition in the marketplace. The antitrust
24 laws rest on the central premise that competition produces the
25 best allocation of our economic resources, the lowest prices,

1 the highest quality, and the greatest material progress.

2 In this case, CosMX contends that ATL has violated the
3 federal antitrust laws by threatening to bring patent
4 infringement claims in China. The only damages CosMX seeks in
5 connection with its counterclaims are those stemming from
6 ATL's threats to bring these Chinese patent assertions.

7 The United States Constitution ensures the right of
8 everybody, whether acting alone or in combination or agreement
9 with others, to petition or appeal to the courts for judicial
10 action, recognizing that when people do so, they will
11 naturally seek judicial action that favors them and also may
12 be unfavorable to others.

13 The law provides that the right to use the courts to seek
14 judicial action is an important right, and that the exercise
15 of that right, even by an agreement, does not normally violate
16 the antitrust laws.

17 Consistent with these general principles, a patent owner
18 is entitled to threaten or bring a patent infringement suit to
19 protect his or her patent rights, and the threat of bringing
20 such a suit ordinarily does not violate the Sherman Act, even
21 where the patent is later determined to be invalid,
22 unenforceable, or not infringed.

23 For a patent infringement suit to violate the Sherman
24 Act, CosMX must prove by clear and convincing evidence:

25 1. ATL's threat of bringing Chinese patent infringement

1 suits was objectively baseless; and

2 2. The baseless infringement assertions and suits were
3 an attempt to interfere directly with the business
4 relationships of one or more competitors through the use of
5 the litigation process as opposed to through the outcome of
6 the infringement suit.

7 A patent assertion is objectively baseless if no
8 reasonable litigant could expect success on the merits. In
9 other words, if an objective litigant in ATL's position could
10 conclude that the suit is reasonably calculated to elicit a
11 favorable outcome, then the suit was not objectively baseless.

12 If you find that ATL's threat of patent litigation in
13 China was not objectively baseless, then you need not consider
14 whether the threat or subsequent lawsuit were an attempt to
15 harass or interfere with the business relationships of one or
16 more competitors. Instead, you must find for ATL and against
17 CosMX on CosMX's charges that ATL violated the federal
18 antitrust laws by pursuing its Chinese patent assertions.

19 If, however, you find that ATL's threat of patent
20 litigation in China was objectively baseless, then you must
21 next determine whether ATL's primary objective was to hurt
22 competition by bringing or continuing these lawsuits
23 regardless of their ultimate outcome, or whether ATL's primary
24 objective was to obtain the relief it sought in these suits.

25 If you find that no reasonable person could have

1 realistically expected to succeed in a suit such as those ATL
2 threatened and brought against CosMX, and that ATL's primary
3 purpose in bringing or continuing to bring such suits was to
4 inflict harm on competition as opposed to the relief sought,
5 then you must next consider whether CosMX has proved the
6 remaining elements of its federal antitrust claim.

7 The U.S. antitrust law applies to import commerce of the
8 United States or to the conduct that affects interstate or
9 foreign commerce of the United States. In this case, CosMX
10 contends that ATL is engaged in import commerce, and also that
11 ATL's conduct affects transactions in goods or services
12 between one or more persons in the United States and one or
13 more persons in a foreign nation.

14 CosMX must show either that (1) ATL's conduct involved
15 import commerce; or (2) that the challenged conduct had a
16 direct, substantial, and reasonably foreseeable effect on
17 commerce within the United States, or on imports into the
18 United States. For each of these alternatives, CosMX must
19 prove that direct effects on either import or domestic U.S.
20 commerce give rise to its claims.

21 For CosMX to prove that ATL's conduct involved import
22 commerce, it is not necessary for ATL actually to have
23 imported products to the United States itself. Instead, CosMX
24 must show only that ATL's anti-competitive behavior was
25 directed at an import market or that it was reasonably

1 foreseeable that ATL's anti-competitive behavior would impact
2 lithium-ion batteries sold in the United States.

3 The direct effects on commerce within the United
4 States -- excuse me. For direct effects on commerce within
5 the United States, it is not necessary that the conduct
6 challenged occurs within the United States. It is necessary,
7 however, that the effect of the challenged conduct be felt
8 directly by persons or firms within the United States.

9 It also is necessary that the effect within the United
10 States be more than indirect, remote, or unpredictable. A
11 situation where action in a foreign country filters through
12 many layers and finally causes a few ripples in the United
13 States is not a direct effect for the purposes of this
14 analysis.

15 In determining whether the effect within the United
16 States of the challenged conduct was reasonably foreseeable,
17 you may consider a number of factors, including ATL's intent
18 and the likely or probable consequences of the challenged
19 conduct. No one factor, however, is conclusive on this issue.

20 In its antitrust counterclaim, CosMX alleges ATL
21 unlawfully attempted to monopolize the market for lithium-ion
22 batteries used in smartphones and the market for lithium-ion
23 batteries used in laptops. To prevail on its claim of
24 attempted monopolization, CosMX must prove each of the
25 following elements by a preponderance of the evidence:

- 1 1. ATL engaged in the anti-competitive conduct;
- 2 2. ATL had a specific intent to achieve monopoly power
- 3 in a relevant market;
- 4 3. There was a dangerous probability that ATL would
- 5 achieve its goal of monopoly power in the relevant market;
- 6 4. ATL's conduct occurred in or directly affected import
- 7 or U.S. domestic commerce; and
- 8 5. CosMX was injured in its business or property by
- 9 ATL's anti-competitive conduct.

10 If you find that the evidence is insufficient to prove
11 any one or more of these elements, then you must find for ATL
12 and against CosMX on CosMX's claim of attempted
13 monopolization. If you find that the evidence is sufficient
14 to prove all five of these elements, then you must find for
15 CosMX and against ATL on CosMX's claim of attempted
16 monopolization.

17 It's not sufficient for CosMX to prove that ATL intended
18 to monopolize the relevant market. CosMX must also show that
19 ATL engaged in anti-competitive conduct, coupled with an
20 intent to monopolize and a dangerous probability that ATL
21 would succeed. Generally, a firm engages in anti-competitive
22 conduct when it attempts to exclude rivals without an
23 efficiency-enhancing justification for its conduct.

24 Anti-competitive acts are acts, other than competition on
25 the merits, that, if successfully completed, would have the

1 effect of preventing or excluding competition or frustrating
2 the efforts of other companies to compete for customers within
3 the relevant market.

4 Harm to competition is to be distinguished from harm to a
5 single competitor, which does not necessarily constitute harm
6 to competition. Some examples of harm to competition include
7 increased prices, decreased production levels, and reduced
8 quality. Mere possession of monopoly power, if lawfully
9 acquired, does not violate the antitrust laws. The
10 acquisition of monopoly power by supplying better products or
11 services, possessing superior business skills, or because of
12 luck, is not unlawful.

13 A competitor may compete aggressively without violating
14 the antitrust laws and may charge monopoly prices without
15 violating the antitrust laws. Their conduct only becomes
16 unlawful where it involves anti-competitive acts.

17 The difference between anti-competitive conduct and
18 conduct that has a legitimate business purpose can be
19 difficult to determine. This is because all companies have a
20 desire to increase their profits and increase their market
21 share. These goals are an essential part of a competitive
22 marketplace, and the antitrust laws do not make these
23 goals--or the achievement of these goals--unlawful, as long as
24 a company does not use anti-competitive means to achieve these
25 goals.

1 In determining whether ATL's conduct was anti-competitive
2 and whether it was -- or whether it was legitimate business
3 conduct, you should determine whether the conduct is
4 consistent with the competition on the merits, whether the
5 conduct provides benefits to consumers, and whether the
6 conduct would make business sense apart from any effect it has
7 on excluding competition or harming competitors.

8 If you find that CosMX has proven by a preponderance of
9 the evidence that ATL's conduct was anti-competitive according
10 to these instructions, then you must consider whether CosMX
11 has proved the remaining elements of its antitrust
12 counterclaim. If, however, you find that CosMX did not prove
13 this element by a preponderance of the evidence, then you must
14 find for ATL and against CosMX on this claim.

15 CosMX must prove by a preponderance of the evidence that
16 ATL attempted to monopolize a relevant market. Defining the
17 relevant market is essential because you're required to make a
18 judgment about whether ATL has attempted to obtain monopoly
19 power in a properly defined economic market. To make this
20 judgment, you must be able to determine what, if any, economic
21 forces restrain ATL's freedom to set prices for or to restrict
22 the production level of the products and/or the employees in
23 the relevant markets CosMX alleges.

24 The most likely and most important restraining force will
25 be actual and potential competition from other firms and their

1 products. This includes all firms and products that act or
2 likely could act as restraints on ATL's power to set prices as
3 it pleases because customers could switch to them if ATL sets
4 its own prices too high. All the firms and products that
5 exert such restraining force are within what is called the
6 relevant market.

7 There are two aspects you must consider in determining
8 whether CosMX has met its burden to prove the relevant market
9 by a preponderance of the evidence. The first is the relevant
10 product market. The second is the relevant geographic market.

11 The basic idea of a relevant product market is that the
12 products within it are reasonable substitutes for each other
13 from the buyer's point of view; that is, the products compete
14 with each other. In other words, the relevant product market
15 includes the products and services that a consumer believes
16 are reasonably interchangeable or reasonable substitutes for
17 each other. This is a practical test with reference to the
18 actual behavior of buyers and marketing efforts of sellers.

19 Thus, for example, if consumers seeking to cover leftover
20 food for storage considered certain types of flexible wrapping
21 material--such as aluminum foil, cellophane, or even plastic
22 containers--to be reasonable alternatives, then all of those
23 products may be in the same relevant product market. Products
24 or services need not be identical or precisely interchangeable
25 as long as they are reasonable substitutes.

1 To determine whether products are reasonable substitutes
2 for each other, you must consider whether a small but
3 significant and non-transitory increase in the price of one
4 product would result in enough customers switching from that
5 product to another product such that the price increase would
6 not be profitable. In other words, will customers accept the
7 price increase or will so many switch to the alternative
8 products that the price increase will be withdrawn?

9 Generally speaking, a small but significant and
10 non-transitory increase in price is approximately a 5 percent
11 increase in the price not due to cost factors, but you may
12 conclude in this case that some other percentage is more
13 applicable to the product at issue.

14 If you find that customers would switch and that the
15 price increase would not be profitable, then you must conclude
16 that the products are in the product market. If, on the other
17 hand, you find that customers would not switch, then you must
18 conclude that the products are not in the product market.

19 In evaluating whether various products are reasonably
20 interchangeable or reasonable substitutes for each other under
21 the price increase test I've just given you, you may also
22 consider the following:

23 Consumers' views on whether the products are
24 interchangeable;

25 The relationship between the price of one product and

1 sales of another;

2 The presence or absence of specialized vendors;

3 The perceptions of either industry or the public as to
4 whether the products are in separate markets;

5 The views of CosMX and ATL regarding who their respective
6 competitors are; and

7 The existence or absence of different customer groups or
8 distribution channels.

9 In deciding whether CosMX has proven a relevant product
10 market, you may also consider what the law refers to as the
11 cross-elasticity of supply, or, in other words, the extent to
12 which the producers of one product would be willing to shift
13 their resources, such as intellectual property, manufacturing
14 facilities, or personnel to producing another product in
15 response to an increase in the price of the other product.

16 Such producers, to the extent that they exist, can
17 increase supply and, therefore, drive prices back to
18 competitive levels, defeating any effort by a would-be
19 monopolist to charge significantly higher prices.

20 Take two shoe manufacturers, for example. The first
21 manufacturer produces shoes for women, while the second
22 manufacturer produces shoes for men. Generally speaking,
23 men's and women's shoes are not reasonably interchangeable
24 and, therefore, might be thought of as being in separate
25 product markets.

1 However, if it is possible that the men's shoe
2 manufacturer could quickly shift its resources to start
3 producing women's shoes if the women's shoe manufacturer
4 raised its prices significantly and vice versa, although women
5 would not buy men's shoes, nor would men buy women's shoes, the
6 ability of each manufacturer to alter its production could
7 prevent the other manufacturer from raising prices
8 significantly. Thus, in this example, men's and women's shoes
9 would be included in the same market.

10 If, in determining the products in the relevant product
11 market, you find that there are manufacturers that have the
12 ability to alter their production to manufacture products that
13 can be reasonably substituted with ATL's, even though they do
14 not presently compete with ATL or CosMX, you may consider
15 whether the existence of these potential alternative suppliers
16 can influence the prices that ATL charges for its product and,
17 if so, that amount of the product that these suppliers are
18 likely to produce.

19 However, if you find that there are no others who would
20 switch production to products that would compete with ATL's or
21 CosMX's, you may define the market solely on your evaluation
22 of whether the existing allegedly competing products are
23 reasonable substitutes for each other.

24 For its antitrust claim, CosMX contends that there are
25 two relevant product markets: (1) the market for soft pouch

1 lithium-ion batteries used in smartphones; (2) the market for
2 soft pouch lithium-ion batteries used in laptops. In
3 contrast, ATL contends that CosMX has failed to prove the
4 relevant product markets it alleges.

5 ATL contends that a properly defined relevant market
6 includes all soft pouch lithium-ion batteries used in consumer
7 electronics generally, and that CosMX fails to consider that
8 manufacturers of lithium-ion batteries for other products
9 could switch to manufacturing lithium-ion batteries for
10 laptops, could switch to manufacturing lithium-ion batteries
11 for laptops and smartphones. You should evaluate the
12 remainder of CosMX's claim based on the relevant market or
13 markets that you determine.

14 The relevant geographic market is the area in which ATL
15 faces competition from other firms that compete in the
16 relevant product market and to which customers can reasonably
17 turn for purchases. In this case, the parties agree that the
18 relevant geographic market is global.

19 If you find that CosMX has proven that a relevant
20 market -- proven a relevant market, you must then decide
21 whether ATL had the specific intent to monopolize that market.
22 In other words, you must decide if the evidence shows that ATL
23 acted with the conscious aim of acquiring the power to control
24 prices and to exclude or destroy competition in the relevant
25 market.

1 Accordingly, the evidence that any particular act was
2 engaged in by ATL would not be sufficient in and of itself on
3 the issue of an attempt to monopolize unless you find that
4 such act was done by reason of a specific intent to injure or
5 destroy competition or to control prices.

6 Now, there are several ways in which CosMX may prove that
7 ATL had the specific intent to monopolize. There may be
8 evidence of direct statements of ATL's intent to obtain a
9 monopoly in the relevant market.

10 Specific intent may also be inferred from what ATL did.
11 For example, if the evidence shows that ATL lacked a genuine
12 business justification and the natural and probable
13 consequence of ATL's conduct in the relevant market was to
14 give ATL control over prices and to exclude or destroy
15 competition, and that this was plainly foreseeable by ATL,
16 then you may, but you're not required to, infer that ATL
17 specifically intended to acquire monopoly power.

18 However, if you find that ATL in its business practices
19 was predominantly motivated by legitimate business aims and
20 that there was no specific intent to control prices or to
21 injure or destroy competition in an applicable part of the
22 alleged relevant market, then you would find against CosMX on
23 the question of an attempt to monopolize.

24 If you find that ATL had the specific intent to achieve
25 monopoly power in a relevant market and engaged in

1 anti-competitive conduct, you also must determine if the
2 evidence shows the next element of attempt to monopolize,
3 namely, that there was a dangerous probability that ATL would
4 succeed in achieving monopoly power if it continued to engage
5 in the same or similar conduct.

6 Monopoly power is the power to control prices, restrict
7 output, and exclude competition in a relevant antitrust
8 market. More precisely, a firm that becomes a monopolist if
9 it obtains the ability to profitably raise prices
10 substantially above the competitive level for a significant
11 period of time.

12 In determining whether there was a dangerous probability
13 that ATL would acquire the ability to control price in the
14 market, you should consider such factors as:

15 ATL's market share;

16 The trend in ATL's market share;

17 Whether the barriers to entry into the market made it
18 difficult for competitors to enter the market;

19 The likely effect of any anti-competitive conduct on
20 ATL's share of the market.

21 Now, the first factor that you should consider is ATL's
22 share of the relevant market. Based on the evidence that
23 you've heard about ATL's market share, you should determine
24 ATL's market share as a percentage of the total sales or
25 shipments in the relevant market. ATL must have a significant

1 share of the market in order to possess monopoly power, but
2 only a lesser share of the market is required where, as here,
3 the claim is based on attempted monopolization.

4 In evaluating whether the percentage of market share
5 supports a finding of a dangerous probability of achieving
6 monopoly power, you also should consider other aspects of the
7 relevant market, such as market share trends and the existence
8 of barriers to entry (that is, how difficult is it for other
9 producers to enter the market and begin competing with ATL for
10 sales), along with ATL's market share.

11 These factors should inform you as to whether ATL has a
12 dangerous probability of achieving monopoly power. The higher
13 the company's share, the higher the likelihood that a company
14 has a dangerous probability of obtaining monopoly power.

15 A market share below 10 percent is ordinarily not
16 sufficient to support a conclusion that a party has monopoly
17 power, but a market share of 20 percent or greater can support
18 an attempted monopolization claim. To have a dangerous
19 probability of obtaining market power, ordinarily a party
20 would be required to have a dangerous probability of obtaining
21 a market share of 50 percent or greater.

22 However, if you find that the other evidence demonstrates
23 that a party would, in fact, have a dangerous probability of
24 obtaining monopoly power even if its market share would be
25 below 50 percent, you may conclude that the party has a

1 dangerous probability of obtaining monopoly power.

2 Nevertheless, the market shares between 17 and 25 percent
3 are legally insufficient to uphold a finding of monopolization
4 absent other compelling evidence that the party had monopoly
5 power.

6 The trend in ATL's market share is something you may
7 consider. An increasing market share may strengthen an
8 influence that a company has a dangerous probability of
9 obtaining monopoly power, particularly where that company has
10 a high market share, while a decreasing share might show that
11 a company does not have a dangerous probability of obtaining
12 monopoly power.

13 You may also consider whether there are barriers to entry
14 into the relevant market. Barriers to entry make it difficult
15 for new competitors to enter the relevant market in a
16 meaningful and timely way. Barriers to entry might include
17 intellectual property rights (such as patents or trade
18 secrets), the large financial investment required to build a
19 plant or satisfy governmental regulations, specialized
20 marketing practices, and the reputation of the companies
21 already participating in the market (or the brand name
22 recognition of their products).

23 Evidence of low or no entry barriers may be evidence that
24 ATL does not have monopoly power, regardless of ATL's market
25 share, because new competitors could enter easily if ATL

1 attempted to raise prices for a substantial period of time.
2 By contrast, evidence of high barriers to entry along with
3 high market share may support an inference that ATL has
4 monopoly power.

5 Again, the purpose of looking at these and other factors
6 is to determine whether there was a dangerous probability that
7 ATL would ultimately acquire monopoly power. A dangerous
8 probability of success need not mean that success was nearly
9 certain, but it does mean that there was a substantial and
10 real likelihood that ATL would ultimately acquire monopoly
11 power.

12 If you find that ATL has violated the antitrust laws,
13 then you must decide if CosMX is entitled to recover damages
14 from ATL.

15 CosMX is entitled to recover damages for an injury to its
16 business or property if it can establish three elements:

17 1. CosMX was in fact injured as a result of ATL's
18 alleged violation of the antitrust laws;

19 2. ATL's alleged illegal conduct was a material cause of
20 CosMX's injury; and

21 3. CosMX's injury is an injury of the type that the
22 antitrust laws were intended to prevent.

23 The first element is sometimes referred to as injury in
24 fact or fact of damage. For CosMX to establish that it is
25 entitled to recover damages, it must prove that it was injured

1 as a result of ATL's alleged violation of the antitrust laws.
2 Proving the fact of damage does not require CosMX to prove the
3 dollar value of its injuries. It requires only that CosMX
4 prove that it was, in fact, injured by ATL's alleged antitrust
5 violation.

6 If you find that CosMX has established that it was in
7 fact injured, you may then consider the amount of CosMX's
8 damages. It's important to understand, however, that injury
9 and amount of damage are different concepts and that you
10 cannot consider the amount of damage unless and until you have
11 concluded that CosMX has established that it was in fact
12 injured.

13 CosMX must also offer evidence that establishes by a
14 preponderance of the evidence that ATL's alleged illegal
15 conduct was a material cause of CosMX's injury. This means
16 that CosMX must have proved that some damage occurred to it as
17 a result of ATL's alleged antitrust violation and not some
18 other cause.

19 Cosmx is not required to prove that ATL's alleged
20 antitrust violation was the sole cause of its injury; nor need
21 CosMX eliminate all other possible causes of injury. It's
22 enough if CosMX has proved that the alleged antitrust
23 violation was a material cause of its injury.

24 Finally, CosMX must establish that its injury is the type
25 of injury that the antitrust laws were intended to prevent.

1 This is sometimes referred to as antitrust injury. If CosMX's
2 injuries were caused by a reduction in competition, acts that
3 would lead to a reduction in competition, or acts that would
4 otherwise harm consumers, then CosMX's injuries are antitrust
5 injuries.

6 On the other hand, if CosMX's injuries were caused by
7 heightened competition, the competitive process itself, or by
8 acts that would benefit consumers, then CosMX's injuries are
9 not antitrust injuries and CosMX may not recover damages for
10 those injuries under the antitrust laws.

11 You should bear in mind, ladies and gentlemen, that
12 businesses may incur losses for many reasons that the
13 antitrust laws are not designed to prohibit or protect
14 against--such as where a competitor offers better products or
15 services, or where a competitor is more efficient and can
16 charge lower prices and still earn a profit. The antitrust
17 laws do not permit a party to recover damages for losses that
18 were caused by the competitive process or conduct that
19 benefits consumers.

20 If you find that ATL violated the antitrust laws and that
21 this violation caused injury to CosMX, then you must determine
22 the amount of damages, if any, that CosMX is entitled to
23 recover. And the fact that I'm giving you instructions
24 concerning the issue of CosMX's damages does not mean that I
25 believe CosMX should or should not prevail in this case. If

1 you reach a verdict for ATL on the issue of liability, you
2 should not consider the damages, and you may disregard the
3 damages instruction that I'm about to give.

4 The law provides that CosMX should be fairly compensated
5 for all damages to its business or property that were a direct
6 result or a likely consequence of the conduct that you have
7 found to be unlawful.

8 Antitrust damages are only compensatory, meaning their
9 purpose is to put an injured party as near as possible in the
10 position that it would have been had the alleged antitrust
11 violation not occurred. The law does not permit you to award
12 damages to punish a wrongdoer---what we sometimes refer to as
13 punitive damages--or to deter particular conduct in the
14 future.

15 You are permitted to make just and reasonable estimates
16 in calculating CosMX's damages. You are not required to
17 calculate damages with mathematical certainty or precision.
18 However, the amount of damages must have a reasonable basis in
19 the evidence and must be based on reasonable, non-speculative
20 assumptions and estimates. Damages may not be based on
21 guesswork. CosMX must prove the reasonableness of each of the
22 assumptions upon which their damages calculation is based.

23 If you find that CosMX has provided a reasonable basis
24 for determining damages, then you may award damages based on a
25 just and reasonable estimate supported by the evidence.

1 If you find that CosMX has failed to carry its burden of
2 providing a reasonable basis for determining damages, then you
3 may not award damages or you may award nominal damages, not to
4 exceed one dollar.

5 If you find that ATL violated the antitrust laws and that
6 CosMX was injured by that violation, CosMX is entitled to
7 recover for such injury that was the direct result or likely
8 consequence of the unlawful acts of ATL. CosMX bears the
9 burden of showing that its injuries were caused by ATL's
10 antitrust violation, as opposed to any other factors.

11 If you find that CosMX's alleged injuries were caused in
12 part by ATL's alleged antitrust violation and in part by other
13 factors, then you may award damages only for that portion of
14 CosMX's alleged injuries that was caused by ATL's alleged
15 antitrust violations.

16 CosMX claims that it was harmed in two the ways. First,
17 CosMX claims that it suffered increased costs from legal and
18 investment advisors to respond to ATL's Chinese patent threat
19 letter and get its IPO approved by regulators. Secondly,
20 CosMX claims that it suffered diminished value of its IPO
21 because of the delay caused by ATL's alleged antitrust
22 violation.

23 Atl claims that neither of these claimed categories of
24 damages are due to any actual or potential harm to
25 competition, and that these claimed damages are instead (1)

1 due to decisions and market factors completely outside of
2 ATL's control, (2) are speculative and unsupported, and (3)
3 are due to such factors as independent decision making by the
4 underwriters of CosMX's IPO and stock market fluctuations that
5 have nothing to do with ATL.

6 The presence of these factors does not mean CosMX did not
7 suffer antitrust injury, but CosMX may only recover for
8 damages caused by the alleged antitrust violation.

9 CosMX bears the burden of proving damages by a
10 preponderance of the evidence, including apportioning damages
11 between the lawful and unlawful causes. If you find that
12 CosMX was injured by ATL's alleged antitrust violation, and
13 there is a reasonable basis to apportion CosMX's alleged
14 injury between lawful and unlawful causes, then you may award
15 damages.

16 If you find that CosMX's alleged injuries were caused by
17 factors other than ATL's alleged antitrust violation, then you
18 must return a verdict for ATL.

19 If you find that there is no reasonable basis to
20 apportion CosMX's alleged injury between lawful and unlawful
21 causes, or that apportionment can only be accomplished through
22 speculation or guesswork, then you may not award any damages
23 at all.

24 If you find that ATL committed an antitrust violation and
25 that this violation caused injury to CosMX, you now must

1 calculate the losses, if any, that CosMX incurred as a result
2 of ATL's antitrust violation.

3 CosMX may not recover damages for any portion of its
4 injuries that it could have avoided through the exercise of
5 reasonable care and prudence. CosMX is not entitled to
6 increase any damages through inaction.

7 The law requires an injured party to take all reasonable
8 steps it can to avoid further injury and thereby reduce its
9 loss. If CosMX failed to take reasonable steps available to
10 it, and the failure to take those steps resulted in greater
11 harm to CosMX than it would have suffered had it taken those
12 steps, then CosMX may not recover any damages for that part of
13 the injury it could have avoided.

14 ATL has the burden of proof to show that CosMX failed to
15 take reasonable measures to limit its damages. To do so, ATL
16 must prove by a preponderance of the evidence that CosMX:

17 1. Acted unreasonably in failing to take specific steps
18 to minimize or limit its losses;

19 2. That the failure to take those specific steps
20 resulted in losses being greater than they would have been had
21 it taken such steps; and

22 3. The amount by which CosMX's loss would have been
23 reduced had CosMX taken those steps.

24 In determining whether CosMX failed to take reasonable
25 measures to limit its damages, you must remember that the law

1 does not require CosMX to take every conceivable step that
2 might reduce its damage. The evidence must show that CosMX
3 failed to take commercially reasonable measures that were open
4 to it.

5 Commercially reasonable measures mean those measures that
6 a prudent businessperson in CosMX's position would likely have
7 adopted, given the circumstances as they appeared at that
8 time. CosMX should be given wide latitude in deciding how to
9 handle the situation, so long as what CosMX did was not
10 unreasonable in light of the existing circumstances.

11 Now, at this point, ladies and gentlemen, we're going to
12 transition and hear closing arguments for the attorneys for
13 the competing parties.

14 The Plaintiff may present its first closing argument to
15 the jury at this time.

16 Would you like a warning on your time, Mr. Powell?

17 MR. POWELL: Thank you, Your Honor. I would like
18 you to let me know if I make it to 10 minutes, please.

19 THE COURT: If you get to 10 minutes, I will tell
20 you.

21 MR. POWELL: Thank you. I appreciate it.

22 THE COURT: You may proceed when you're ready.

23 MR. POWELL: Good morning, ladies and gentlemen.
24 It's nice to have a chance to talk with you-all again
25 directly.

1 My colleague, Mr. Adam Wolfson, and I look forward to
2 summarizing our case to you this morning. But before I do
3 that, I just want to thank you for the time that you've taken
4 away from your lives to be here this past week.

5 I've seen that you've all been taking notes and paying
6 attention to what the lawyers and the witnesses are doing, and
7 I know that we've given you a lot of information over the
8 course of the last week, and I just want to thank you again.
9 This matter is obviously very important to my client ATL and
10 to the ATL witnesses we were able to present live during this
11 trial. And so we certainly appreciate your attention.

12 Next slide, please.

13 Now, just to sort of reset here, when we first introduced
14 you-all to ATL last Thursday, we started by giving you a
15 little bit of ATL's story, how the company started in 1999 and
16 saw an opportunity for what we've talked about this week,
17 pouch-type lithium-ion batteries.

18 Now, ATL believed having patent protection was critical
19 to building long-lasting value and the founders of ATL valued
20 innovation above all else. So they identified an American
21 innovation company, Bellcore, that was part of the Bell system
22 companies right here in Texas. You see, Bellcore was doing
23 fundamental research, and they had a sizable patent portfolio
24 related to early pouch battery technology, but they had not
25 yet commercialized it.

1 And as you heard from Mr. Joe Lam, a senior ATL and TDK
2 executive who's been with us all week during trial, you heard
3 Joe Lam explain that ATL from the beginning had great respect
4 for innovation and for intellectual property and that ATL
5 approached Bellcore to license its patent portfolio. And
6 within just two years of licensing that portfolio, ATL was
7 successful in commercially manufacturing and selling millions
8 of devices. And ATL paid Bellcore millions of dollars for
9 that license.

10 Frankly, this story should have replayed itself here.
11 CosMX has known since the first day it entered the lithium-ion
12 battery industry that ATL held the innovation leadership
13 position and had built a substantial patent portfolio. But
14 CosMX never asked for a license. Instead, CosMX just decided
15 to imitate ATL's technology and compete by hiring away its key
16 engineers, reverse engineering its products, and imitating its
17 patents.

18 The fact is that had CosMX been willing to negotiate in
19 good faith with ATL when ATL offered CosMX a license back in
20 June of 2021, we would not be here before this Court and you
21 ladies and gentlemen of the jury.

22 Atl offered different licensing packages ranging from 5
23 to 12 percent with the higher royalty packages, including a
24 license to ATL's entire worldwide patent portfolio for all
25 smartphone and laptop and related consumer products, but CosMX

1 refused even to provide a counteroffer.

2 Instead, CosMX put up superficial arguments and asked for
3 additional information that it either did not need to evaluate
4 the infringement assertions that ATL had made or that it knew
5 ATL did not have. As it turns out, we now know these road
6 blocks to negotiation were strategic. CosMX was only
7 interested in delaying those negotiations for as long as it
8 took to get its initial public offering approved.

9 Now, we know this because as soon as that approval came,
10 CosMX stopped responding to emails and basically ghosted the
11 ATL patent licensing team. So at that point ATL had no other
12 options available to it. At this point, it knew CosMX was
13 infringing its patents and that it had no intention of
14 stopping. That is when ATL decided to initiate patent
15 infringement lawsuits in several countries, including this
16 lawsuit right here in Marshall.

17 Now, you-all might be curious why is this case between
18 two Chinese companies here in Marshall. Well, first, this may
19 come to some of you as a surprise, but for what my team does,
20 patent litigation, Marshall is our Grand Ole Opry. It's our
21 Broadway, if you will. The best lawyers come to Marshall to
22 try the most important patent cases in the country, and that
23 is no exaggeration.

24 Now, Mr. Lam explained part of the reason ATL came to the
25 United States and to Marshall in the first place, ATL has

1 United States patents because patents can only be enforced in
2 the country in which they issued. So because ATL wants patent
3 protection in the United States, as well as in Europe and
4 Asia, ATL filed certain patents in many different countries.

5 Next slide.

6 And as you have also heard during this trial, the United
7 States is the largest market in the world for consumer
8 products that use lithium-ion batteries. So it makes sense
9 for ATL to have patent protection here since so many of the
10 lithium-ion batteries made in China come here in devices made
11 by America's biggest tech companies like and

12 and .

13 And I hope, ladies and gentlemen, that you saw through
14 some of the shell game that was going on during trial about
15 whether CosMX knows who its suppliers are, whether it has
16 documentation regarding the technical details of its own
17 products, and whether it knows how many of its own products
18 make it to the United States.

19 None of their excuses are credible or supported by any
20 testimony or evidence. It's just arguments generated to try
21 to confuse all of you and escape for a little longer the hard
22 reality that CosMX needs to take a license to ATL's patents if
23 it wants to keep using them.

24 Next slide.

25 Now, just to recap the ATL witnesses that presented live

1 testimony in support of the patent infringement case, you will
2 recall that for the '987 separator patent on the left, ATL
3 presented expert opinion and analysis from Dr. Troy Hayes.
4 And it presented the invention story for that patent through
5 its own Mr. Xinghua Tao, who came here from China to offer his
6 support.

7 For the '363 electrolyte recipe patent on the right-hand
8 side, ATL presented expert opinion and analysis from Dr. Steve
9 Martin, and it presented the invention story through ATL's own
10 Dr. Fei Wu.

11 Finally, in the middle for the '352 notch electrode
12 groove patent, ATL presented opinion and analysis from Mr.
13 Hruska, and it presented the invention story through ATL's own
14 Mr. Peipei Guo.

15 Next slide, please.

16 Now, ladies and gentlemen, the Court has instructed you
17 that there are four sources of evidence, and one of them is
18 applicable presumptions. And as you might remember from the
19 patent video or the Court's charge, patents are entitled to a
20 presumption of validity. Why? Because patents that issue
21 have already been through the Patent Office. And like you
22 heard in the video that the Court showed you, the Patent
23 Office works very hard to evaluate patents and does a good job
24 making sure that the patents it issues should have issued in
25 the first place.

1 And you also heard from the Court's instructions that
2 CosMX has the burden of proving invalidity by what's called
3 clear and convincing evidence, meaning that CosMX must present
4 evidence that leaves you with a firm belief and conviction
5 that it has highly -- it is highly probable that the factual
6 contentions of the claim or defense are true. And ATL submits
7 that CosMX cannot meet the heightened burden. And if you have
8 any lingering doubts, the presumption of validity must stand.

9 Next slide, please.

10 Now, I prepared a demonstrative to help you make sense of
11 all this and to help add some context to something that you
12 heard yesterday during Doctor Hayes' cross examination.

13 Now, Doctor Hayes was asked by Defense counsel on cross
14 examination, how could it be that the very same type, quality,
15 and weight of evidence that he reviewed and relied on to prove
16 infringement by a preponderance of the evidence could not also
17 be used by the Defense to meet its burden of proving
18 invalidity by clear and convincing evidence.

19 Well, on the screen I've depicted two cars on their way
20 to the '987 Patent, which for CosMX and its expert Doctor
21 Lucht is up on top of a fairly sizable hill; whereas, for
22 ATL's expert, Doctor Hayes, who is in the same exact type,
23 quality, and weight of car as Doctor Lucht, but his
24 destination to the '987 patent is just slightly elevated from
25 its starting place.

1 Now, as I start the animation, I want you to watch the
2 gas gauge. At the beginning, you can see the gas gauges are
3 exactly the same. Now, each vehicle is identical to the
4 other. Let's see what happened. Right? Each vehicle is
5 identical to the other and each started with 10 gallons of
6 gas.

7 Here at the end of the animation--if you could run it
8 through to the end--you see Doctor Lucht did not make it to
9 his destination whereas Doctor Hayes did. This is because
10 Doctor Lucht's car had a much steeper incline to overcome and
11 the engine had to work harder and use more gas than Doctor
12 Hayes' did.

13 This is how different burdens of proof can render the
14 same evidence sufficient for proving infringement but
15 deficient for proving invalidity.

16 THE COURT: You used 10 minutes, counsel.

17 MR. POWELL: Okay. In that case, Your Honor, I
18 think I'll pass my time to Mr. Wolfson who's going to handle
19 the other part of the case. Thank you.

20 THE COURT: All right. You may continue with
21 Plaintiff's first closing, Mr. Wolfson. Would you like a
22 warning on the time you use?

23 MR. WOLFSON: Ten minutes as well, Your Honor.

24 THE COURT: When you've reached 10 minutes.

25 MR. WOLFSON: Thank you.

1 THE COURT: Proceed.

2 MR. WOLFSON: Ladies and gentlemen, let's talk about
3 CosMX's counterclaim. As you heard the Court mention, there
4 is a very high burden that they need to get at from the very
5 beginning, and that's rooted in the Constitution. It's rooted
6 in free speech.

7 When someone has a patent, we want to make it
8 intentionally difficult for them to say that you can't
9 complain to them about infringing their patent. So that is
10 why in the first instance they have to prove by clear and
11 convincing evidence, first, that ATL's patent assertions were
12 objectively baseless, meaning no reasonable person could ever,
13 ever expect any sort of success on them.

14 And how do we know that they can't prove that and have
15 not proved that? Well, we are here on one of the patents that
16 were asserted back in June of 2021, aren't we, the '987
17 Patent. And how do we know they can't prove that? Well, in
18 China, ATL actually won on one of the patents that it
19 asserted. Remember, the equivalent of 4.2 million on one
20 patent, one product in China.

21 Now, what you also heard the Court say is that just
22 losing a case is not in and of itself evidence of objective
23 baselessness. And all they've shown is that a few of the
24 patents were ruled invalid, a few of them were withdrawn, and
25 some of them weren't ever asserted.

1 But what have you not seen? You haven't seen the
2 patents. You haven't seen ATL's infringement evidence. You
3 haven't seen their invalidity arguments. You haven't seen
4 their prior art arguments. You haven't seen the decisions
5 from the Chinese courts. You haven't seen the accused CosMX
6 batteries. You haven't seen anything.

7 And their own lawyer Wei Liu, remember she got up there
8 on the stand and she said, Well, we could have -- we had the
9 option to claim some kind of abuse of process in China. But
10 they didn't do it.

11 And then you heard from their lawyer, Roy Liu. Remember
12 he was the gentleman on zoom, and he said, Well, I think
13 they're -- I think they're objectively baseless. But he don't
14 know if CosMX infringed the patents. He didn't know if they
15 were invalid. He didn't see ATL's infringement evidence. He
16 didn't provide anything. And this is their burden. They got
17 to get over that clear and convincing burden just to get to
18 the rest of their claims.

19 And then what else do we know? Well, we know they had
20 five separate meetings over two months on these patents. If
21 they were so obviously baseless, why did they try to settle
22 them for two months? Well, as we know, they are trying to
23 extend it out until they got their IPO approved. But why
24 didn't they just say, We're not talking about this? They
25 can't get over this hurdle.

1 But then the second part is this whole subjective intent
2 to directly interfere with a competitor's business. What do
3 we know from the evidence? ATL said, Hey, we want to keep
4 this confidential. Hey, we're not going to sue you until
5 after your IPO is over. Does that sound like trying to
6 interfere with someone's business?

7 Now, then if you try to get -- if you can even get over
8 the free speech hurdle, then you get to the point of an intent
9 to monopolize, a specific intent to monopolize the market.
10 Remember, it's not just about a competitor. It's about
11 competition. ATL didn't sue LG, Samsung, BYD, Sunwoda, EVE,
12 High Power, any of the other competitors that you saw in the
13 market again and again and again.

14 What we didn't see is any evidence that even if CosMX had
15 been impaired in any way, that the brand customers with all of
16 their smartphones and laptops with these batteries would have
17 anything less than three, four, five other current suppliers
18 for their products.

19 And what we also didn't see is anything from Doctor
20 Maness saying CosMX would have ever been harmed. Remember one
21 of my very first questions, I said, If they had to pay a
22 royalty and raise their price, would they be unable to
23 compete? And he said, No, they'd be fine. And I asked him,
24 Well, did they lose any customers from ATL's assertions? No.
25 Did -- would they have lost any customers from them? No.

1 How's that harm to CosMX, let alone harm to competition?
2 And how does that show a dangerous probability of obtaining
3 some kind of monopoly power when CosMX can still compete and
4 every single other competitor can still compete?

5 And then what you also heard from the Judge is that this
6 isn't -- well, the law is that for an antitrust claim, if
7 everything happens overseas, if your injury happens overseas,
8 if it's not directed at the U.S., it's not a U.S. antitrust
9 claim.

10 So let's go over their theory. The Chinese counterclaim
11 Plaintiff receives infringement letters in China, that then
12 asks -- that then leads to regulators in China asking
13 questions, that supposedly leads to a delay of a Chinese IPO,
14 that supposedly means that they get less money in Chinese
15 yuan, that supposedly prevents them from buying land in China
16 to manufacture battery cells in China to sell to other Chinese
17 companies. I don't hear anything about the U.S. there.

18 And when I asked Doctor Maness, I said, Well, did you
19 trace how prices would have changed from CosMX to the pack
20 house to the contract manufacturers to the brand customers, he
21 says, No. So he didn't offer any evidence that the price of
22 your iPhone is going to go up or the price of your laptop is
23 going to go up. He didn't offer any evidence.

24 And then this damages theory, I mean, I don't know where
25 to start with that. Let's think about their theory. The

1 Chinese patent assertions and only the Chinese patent
2 assertions delayed the IPO. But what do we know from the
3 evidence was parallel to the Chinese assertions at every
4 single step of the way? The U.S. patent assertions.

5 And what did Doctor Maness tell you on the stand
6 yesterday? Well, those aren't anti-competitive, those didn't
7 delay the IPO. But they let the regulators know about them at
8 the exact same time, the regulators had questions about them
9 at the exact same time.

10 Remember that August 10th letter and then the August 25th
11 response? U.S. and Chinese patent assertions at the same
12 time.

13 And what else have we seen? The regulators had questions
14 about tons of things that had nothing to do with ATL. Ms.
15 Keke He, remember she was the woman with the glasses kind of
16 looking down at the camera on her zoom depo? She said, Well,
17 we had questions at the beginning. And I showed you those
18 questions. And then on August 10th, we had two out of the
19 three questions that Doctor Maness says delayed the IPO.
20 Nothing to do with ATL. It was just the regulators asking
21 about something else, and then they answer it.

22 I mean, the delay theory just doesn't hold up, especially
23 because they waited three weeks to even tell the regulators
24 about these infringement contentions.

25 And then this stock market idea. Well, apparently the

1 IPO going down is due to the stock market going down. And the
2 theory was, well, had it happened on August 16th, it would
3 have been higher. But Doctor Maness didn't calculate that
4 number. And then when I showed him the stock market, ATL,
5 remember, sent these infringement letters when the stock
6 market was rocketing upward.

7 So apparently the damages theory is that ATL knew the
8 stock market was going to flatten out and go down, even though
9 Doctor Maness conceded ATL knew nothing about that, doesn't
10 control the stock market, and if the implications of his
11 theory is that ATL by sending the infringement letters when
12 the stock market was going up would somehow benefit CosMX by
13 delaying the IPO because the stock market would keep going up,
14 it just makes no sense.

15 And remember the whole difference in IPO price is based
16 on what Mr. Alex Li told you they had hoped to get from the
17 IPO a year earlier. Look, I get why an executive at a company
18 would want an IPO price to go higher. But what they hope for?
19 That's not evidence.

20 When I was 11, I hoped my parents would buy me the bike
21 they promised if I kept my grades up. When I didn't deliver,
22 they didn't get me the bike. Is that harm to me? Did they
23 harm me? No, it's because I didn't deliver.

24 Now, the same thing is here. They didn't deliver what
25 the underwriters were hoping for. And we saw that again and

1 again. Regulators asked, well, why do you have 10 percent of
2 the patents that your competitors do And they kept on asking
3 about all these different aspects of their business. There
4 was the Maxell litigation that was also publicly known,
5 publicly disclosed, another reason that the IPO price could
6 have gone down. They haven't assessed any of that.

7 Look -- and then this mitigation idea, this idea that
8 they could have taken reasonable steps to, quote, you know, to
9 avoid some of their harm. Well, they could have let the
10 regulators know earlier. Right? And then if this IPO was so
11 important to have done in a good stock market environment, why
12 not just wait? Right?

13 If -- so, ladies and gentlemen, this is -- it reminds me
14 of a dog bite case. You walk outside; your neighbor's dog
15 comes up and bites. You go over to him and say, look, you owe
16 me my medical bills. And he says, well, I don't have a dog.
17 You prove he's got a dog. He says, well, my dog didn't bite
18 you. You prove his dog bit you. Well, it wasn't that bad.
19 You prove it's that bad. Well, it's your fault. That's what
20 this claim is about. They're just trying to shift the
21 attention.

22 As I mentioned before, last week on Thursday, this
23 counterclaim is just going to show again and again that what
24 this is really about is CosMX trying to avoid paying its fair
25 share. We believe through all this evidence and through their

1 compete lack of evidence, their inability to get over that
2 clear and convincing free speech hurdle, their inability to
3 show any of the elements to show even that this should be in
4 the U.S., well, I think we think that we've established that.

5 Now --

6 THE COURT: Ten minutes have been used.

7 MR. WOLFSON: Thank you, Your Honor.

8 As Mr. Powell said, we really appreciate your time and
9 all the attention you've given this week. We know it's a lot.
10 And so I just want to say thank you.

11 And at this point CosMX's attorney is going to get up and
12 talk to you, and then we're going to have an opportunity to
13 come back and finish that out. So until we speak again, thank
14 you.

15 THE COURT: All right. The Defendant may now
16 present its closing argument to the jury.

17 Mr. Ivey, would you like a warning on your time?

18 MR. IVEY: Yes, Your Honor. I'd appreciate eight
19 minutes.

20 THE COURT: I'll warn you when you have eight
21 minutes remaining.

22 MR. IVEY: Thank you.

23 THE COURT: You may proceed.

24 MR. IVEY: Thank you.

25 Well, good morning, ladies and gentlemen. This is the

1 last opportunity I'll have to talk with you, and I want to
2 thank you again for your taking the oath and for your paying
3 such close attention to what we've had to say and for joining
4 us in this investigation into this very important case.

5 Now, I began by making certain promises, one of which was
6 that we would be investigating together ATL's allegations with
7 regard to patent infringement in this case. Remember they
8 have the three patents. We'll go over that.

9 This is essentially a matter of promises made and
10 promises kept. We have shown that the patents that are
11 asserted in this case are invalid and that CosMX does not
12 infringe these patents.

13 We started with a little bit about the company CosMX. It
14 has the impressive story of innovation that you've heard. We
15 began R&D research and development in lithium-ion batteries in
16 1998. We have three production facilities. We have talented
17 research and development engineers and technicians, and we
18 have been competing on technology, quality, and price, and
19 we've been competing effectively, which is why we got ATL's
20 attention in the way that we did.

21 Now, the in-house technology we have has been proven to
22 you by Dr. Suli Li, who came here, took the oath, and talked
23 to you about the work she's done over the last eight years at
24 CosMX. She told you that she came from ATL before she became
25 the director of fundamental research at CosMX. But the other

1 thing she did was she looked you-all in the eye and she told
2 you that, when she left ATL, she did not take any proprietary
3 information with her, nobody on her team has ever tried to
4 access proprietary information from ATL, and no one at ATL has
5 ever complained to her about taking proprietary information.
6 That was live, under oath testimony in this case.

7 She also explained how the department and the division
8 has grown over the years, competed effectively, and been
9 recognized for its accomplishments, including the recognition
10 from the lithium-ion batteries and innovations authorities for
11 the first prize of Science and Technology Progress Award in
12 2022.

13 Ladies and gentlemen, it's been an impressive story of
14 competing, growing, and innovating at CosMX, and Doctor Li
15 talked to you about that.

16 We also told you when we started this that one of the
17 things you would see was that, as CosMX has been competing
18 effectively and growing and technologically innovating, CosMX
19 has gotten the attention of ATL. ATL has been watching, and
20 it has been unhappy about the straight-up competition, and
21 since then, ATL has not been competing fairly against CosMX.

22 And ATL has a problem here, because you've now seen some
23 of the evidence from our investigation right here during this
24 trial. We've talked about our headquarters, but we've also
25 shown you the evidence with regard to what was going on at

1 ATL.

2 The fact of the matter is the threats have been made and
3 they have followed through on them. And what you saw when Mr.
4 Lam took the stand was there was an admission of intentional
5 interference with CosMX's IPO. The question was asked, "And
6 what led you -- what led you to make the decision to file the
7 lawsuits against CosMX?"

8 And his answer was, "Because in 2020 we learned that they
9 were trying to do the IPO and we foresee they will collect
10 more capital from the market and they will expand production
11 and ship more infringing product and causing us more
12 damage."

13 That's the testimony from the executive vice president at
14 ATL. And we'll come back to that in a bit because there's
15 more we want to show you with regard to that.

16 Now, as we talked to you about this case and as we've
17 investigated together the allegations, you will recall that
18 there was the statement made during the Federal Judicial
19 Center video that it is important for us, CosMX, to have an
20 opportunity to present our case to people like you, members of
21 this jury, because we were not in the room at the time these
22 patents were prosecuted. This is our place to vindicate the
23 fact that we didn't have an opportunity to comment on these
24 patents and to show why they are invalid.

25 We have the patents that they've asserted: the '987

1 Patent with the priority date of April 11, 2018, the separator
2 patent; the '363 Patent, with the priority date of September
3 21, 2018, the electrolyte patent; and the '352 Patent, which
4 has the priority date of August 31, 2015, the electrode
5 patent.

6 And one of the things you've seen, ladies and gentlemen,
7 during this case is that we kept our promise during this
8 investigation because we talked to you about the law and we
9 showed you how we've complied with it.

10 In order for someone to be entitled to a patent, the
11 invention must be new, and an invention is new when the
12 identical system or method has not been made, used, or
13 disclosed before. If an invention is not new, it is
14 considered to be anticipated.

15 And in this case, ladies and gentlemen, that type of
16 anticipated reference could be a single device or it could be
17 a single previous publication or patent that predates the
18 claimed invention.

19 And, ladies and gentlemen, we've shown you categories of
20 prior art, service-single devices and single previous
21 publications or patents in this case, and they fell into three
22 categories--commercial products.

23 You saw the S9 from Samsung and the iPod Touch 6. You
24 saw the purchased electrolytes which were developed at CosMX
25 and went through the process of offer and sale and have been a

1 commercially-available product for years before the patents
2 were issued here. And there were also individual publications
3 which individually and together cause us to realize that these
4 patents are invalid.

5 We started with what came before the patents for the '987
6 Patent. It was the iPod 6 and the Ueki reference.
7 Individually, each of those stands alone to invalidate the
8 patent. For the '363, there were three individual categories
9 of references--the Samsung S9, the electrolytes that were
10 developed by CosMX, and the Zeng reference.

11 And then for the '352 Patent, we had the Wang and the
12 Deng references which in combination have all of the elements
13 of the '352 Patent. Each of those stand alone to prove
14 invalidity.

15 Now, you also heard proof positive from Dr. Brett Lucht
16 about each of these categories, the '987 separator patent is
17 invalid and not infringed; the '363 Patent, the electrolyte
18 patent, is invalid and not infringed; and the '352 electrode
19 patent is invalid and not infringed. He showed you the
20 evidence in great detail with regard to why he came to those
21 conclusions after thorough investigation and testing through
22 his own work and through his work with independent
23 laboratories. And the evidence, ladies and gentlemen, has
24 been clear and convincing in this regard.

25 Let's start with another overview of the individual

1 patents starting with the '987 Patent. We have as prior art
2 Ueki and the iPod Touch 6 battery. And for the Ueki
3 reference, that was November 17, 2015. It came before the
4 '987 Patent and the iPod Touch 6 battery, January 2017, made
5 and sold by CosMX, also before the date the priority date for
6 the '987 Patent.

7 We took a close look at the separator patent and found it
8 to be anticipated and invalid because when we looked at the
9 battery of the iPod Touch 6, it anticipated claims 1 and 7
10 [sic], the only claims that are asserted here. And we showed
11 you that the battery was made in 2017 January, more than a
12 year before the '987 Patent's April 11, 2018, priority date.

13 We also showed you the serial number for that battery so
14 we could track it.

15 And these facts are undisputed, ladies and gentlemen.
16 This is prior art, this phone was in use, and it had this
17 battery with that date.

18 We showed you the sales, the shipment and delivery slips
19 for this type of sale. CosMX sold and shipped the iPod Touch
20 6 cells in January of 2017. You see the same serial numbers
21 and the same specification models that we showed you with
22 regard to the iPod Touch 6 battery just a moment ago. And you
23 see the delivery date there of January 11, 2017, in the upper
24 right-hand corner there, and we actually showed you the actual
25 sales and shipping slip, which is also shown on the screen

1 here.

2 There was also the EAG Laboratory testing which is an
3 independent and respected laboratory that tested the battery
4 for the iPod Touch 6 and found that it meets all of the
5 claimed ranges with regard to the '987 claim 1 and claim 17.
6 The range there was 0.3 to 3.0, and the iPod Touch battery
7 clearly had information and elements that met all of those
8 specifications.

9 Now, the prior art we showed you was the Ueki reference
10 from November 17 of 2015, and you also had the iPod Touch 6
11 battery. So those are two sources. And, once again, we went
12 a little bit more carefully into the Ueki reference and showed
13 the publication date there was December 22 of 2011.

14 Now, there was a suggestion by Doctor Hayes when he put
15 up this cartoon and suggested that Ueki does not disclose the
16 thickness of the porous layer. This isn't science, ladies and
17 gentlemen, and this is not the experimentation that you
18 deserve from a scientist of supposed character and caliber
19 with regard to this kind of a proceeding. This is just
20 basically a cartoon and it should be rejected as that.

21 What you saw from Doctor Lucht was an actual review and
22 testing of the tables of information that were supplied in
23 Ueki, including table 1 here, which goes through and handles
24 the issue of thickness, which is the issue that was being
25 concerned about, of the porous layer.

1 And what Doctor Lucht was able to show was that the
2 thickness has shown in the maximum boxes, the rectangles on
3 the left there and underneath the equation here, is -- lines
4 up directly with what's the thickness of the porous layer
5 within claim 1 of the '987 Patent. And what you see here is
6 that the range, which is supposed to be between 0.3 and 3.0,
7 is in fact within that range, 1.14 to 1.21. Squarely within
8 the claim range, clearly anticipates claim 1 of the '987
9 Patent.

10 That brought us to the '363 Patent. And, again, we have
11 the actual physical model of the Samsung S9+. And the
12 depiction we had takes us inside that battery, and what we see
13 there is that that -- in addition to the other types of prior
14 art, the Samsung battery was sold to AT&T on July 24th, 2018.
15 And we took a look inside the battery, we found the date there
16 that we just talked about, eight months prior to the '363
17 Patent's priority date, and it was sold on the date there of
18 July 24, 2018. Undisputed.

19 There was also independent laboratory work done by EAG
20 again and evaluated and reviewed by Doctor Lucht. And what we
21 showed here was that with the -- regard to the electrolyte
22 composition, there is the formula here under '363 claim 1
23 where you have the conditions that have to be met in that
24 second block for 11 percent weight and about eight percent
25 under that, and then 0.3 down below. And each of those was

1 found by the EAG Laboratory with regard to the Galaxy S9,
2 showing that it meets each of the elements and limitations of
3 claim 1, undisputed with regard to the '363 Patent.

4 Now, we talked a little bit about Doctor Hayes' cartoon
5 because what he was suggesting there was that he really
6 couldn't figure out the thickness because of the hills and the
7 trees and so forth, which have nothing to do with this patent.

8 What Doctor Lucht said in response was that there was no
9 shift in the values. It is -- the question was asked, "Is it
10 at all possible that the electrolyte that you inspected had
11 been degraded to such an extent that when the phone was
12 actually new, these numbers that you have indicated with the
13 orange triangles that we just saw could have been completely
14 off the scales?"

15 And his answer was, "No.

16 "And what's the basis for that opinion, Doctor?"

17 Answer is this, "The ratios that are shown here are not
18 close to the edges. And any small variation in the
19 electrolyte from the small amounts of the decomposition would
20 not shift these values far enough to take them outside of the
21 range."

22 The last question was, "Doctor, among the research that
23 you've done, have you done research specifically -- have you
24 done specific research on electrolyte composition stability?"

25 And the answer, "Yes, I have."

1 And as you recall from his credentials, his research in
2 this regard is extensive. It's one of the key and main
3 focuses of the work he does.

4 Now, there was another question raised during the course
5 of the cross examination with Doctor Lucht about the idea that
6 maybe there were examples of problems with the battery. None
7 of that was borne out by the investigation and the review of
8 the batteries that were tested by the EAG Laboratory which
9 documented exactly what the condition of the battery was, what
10 the phone condition was when they got it and when they opened
11 it, and proceeded to perform the tests.

12 And one of the things that was brought up was this idea
13 of battery swelling. And what Doctor Lucht explained was, if
14 there's significant decomposition of the electrolyte, it would
15 generate a significant amount of gas and the battery would
16 puff up. And he gave an example of that which you see here.
17 But that's not an example of the phone that was tested. The
18 phone that was tested showed no swelling.

19 The other thing Doctor Lucht mentioned, which was part of
20 the scientific investigation here, was that what you can see
21 is that the electrolyte, as it was being extracted, removed by
22 a needle here, has been extracted from the battery and it's
23 colorless, which once again is an indication that there has
24 been no significant electrolyte degradation because, when the
25 electrolyte decomposes, it changes color. It can go kind of

1 to dark yellow or even to black. And that hadn't happened
2 here. You can see the liquid is essentially clear.

3 That's, again, undisputed.

4 And so, ladies and gentlemen, with regard to the '363
5 Patent, it is anticipated and invalid because the elements of
6 the Samsung S9 battery here contain all of the elements that
7 were claimed in claim 1 of the '363 Patent. The Samsung
8 Galaxy S9 phone and the battery anticipate claim 1 of the '363
9 Patent.

10 The other thing we showed in another independent category
11 of anticipatory art and references is that what was referred
12 to as the DP018 and the SW-E7 electrolytes which were also
13 prior art. Now, you will recall from Doctor Li that the DP018
14 was actually developed by her and her team at CosMX. This is,
15 again, before the date of the '363 Patent's earliest priority.
16 And so DP018 was on sale and purchased in large commercial
17 quantities before the priority date of the '363 Patent.

18 Similarly, SW-E7 was also on sale before the priority
19 date of the '363 Patent and the electrolyte formulas were
20 fully described in the relevant purchased emails.

21 Now, there has been an effort, a great effort, much
22 exuberance has been put into the idea of no one knows what's
23 the same or different about these different compounds at
24 CosMX, which is preposterous given the fact that we're talking
25 to Dr. Suli Li, the director of fundamental research there,

1 and she knows exactly what they are.

2 And what she told us was that, with regard to DP018,
3 SW-E7, and DP060, the question was asked, How does SW-E7
4 electrolyte compare with DP018, the one that was clearly made
5 in-house at CosMX, and with DP060 also made in-house?

6 She said, and she was clear, The three electrolytes share
7 the identical formula.

8 Why does CosMX have more than one supplier for the same
9 electrolyte?

10 And the answer was, In our industry, it is very common to
11 have different suppliers for the manufacture of the same
12 identical electrolytes. This practice is to maintain
13 stability among our supplies and our suppliers.

14 It doesn't mean that just because they have different
15 sales codes, product codes, supplier codes, that they're
16 different electrolytes. They're simply supplied by different
17 supplier, but the electrolyte is identical in each of these
18 instances.

19 And so knowing that DP018 and SW-E7 share the identical
20 formula, we also showed you emails for the purchase, sale, and
21 shipment offers and the purchases and sales of these
22 electrolytes. We had the DP018 shown for arrival on April 19
23 of 2018, and we had the purchase department with a subsequent
24 purchase for the SW-E7 electrolyte from a different company
25 with the same formula.

1 And what you have here is you have Tinci was the company
2 that was supplying the DP018 on the top, and Smooth Way was
3 the company that supplied SW-E7 on the bottom, still the same
4 electrolyte.

5 And what was asked of Doctor Lucht was this question,
6 "Now, earlier you said it's your opinion that these
7 electrolytes have the same recipe."

8 And Doctor Li has confirmed that.

9 And then the question was, "Why does the DP018 say .14
10 for the lithium salt, but the SW-E7 says 14 for the lithium
11 salt?"

12 And the answer, which is correct, is that "So these
13 weight values -- so these values are in weight percentages,
14 and .14 is just another way of saying 14 percent."

15 There's nothing nefarious or mysterious about that with
16 regard to these chemists.

17 The other reference we had now was the prior invalidating
18 prior art reference, and this was an invention patent
19 application, the Zeng reference, published on November 9th of
20 2016 and the present invention was clearly for electrolytes.
21 It also has the formula showing, with regard to the
22 electrolyte composition, each of the elements that's there in
23 '363, and you see them checked off on the right side. And the
24 corresponding colors for trinitrile and the dinitrile are
25 shown in these other boxes, and the PP reference is also shown

1 in the solvent composition on the left side under Zeng.

2 Each of the elements are present in Zeng, and it meets
3 claim 1 of the '363 Patent. The problem for ATL is it meets
4 it years before ATL supposedly invented this.

5 We then had Doctor Martin compounding his own error with
6 regard to the '363 Patent because he went on to put this
7 second cartoon in front of you which has to do I think with a
8 lemonade pitcher and maple syrup.

9 And what he said was, You wouldn't be able to follow the
10 Zeng reference to make the solutions that Zeng is teaching.
11 Is that correct?

12 And he said, No one would be able to follow it.

13 And that, ladies and gentlemen, is scientific nonsense.
14 The fact of the matter is Doctor Lucht followed Zeng exactly
15 from the teachings in the specification of the patent. And
16 what he told us was that, "So what did you do to determine the
17 weight percentage of propyl propionate relative to the entire
18 electrolyte?"

19 And he said, "So what I did was I went into my laboratory
20 and I prepared the baseline electrolyte formulation as
21 described in the Zeng patent.

22 "Did you follow the steps of Zeng exactly?"

23 And the answer was, "Yes, I followed the steps of Zeng
24 exactly."

25 And from that, we know that Zeng anticipates every

1 element of the claim 1 of the '363 Patent, and it, therefore,
2 invalidates that reference.

3 That brings us to '352. Now, '352 is the patent that
4 we've asserted obviousness against, and the two references we
5 have in that regard are the Wang reference from November 19 of
6 2014, combined with the Deng reference from September 8 of
7 2010. Again, far earlier than the actual '352 Patent priority
8 date.

9 What we showed, ladies and gentlemen, during the course
10 of the trial and during our investigation was that Wang, the
11 first reference, had everything in it except the notch which
12 is shown down several lines with the red item here as a first
13 electrode plate notch. That's not supplied in Wang.
14 Everything else is. No question about it. And they're all
15 checked off on the right because they're there.

16 What it doesn't have is supplied by Deng, and that's the
17 notch. And what you see in the Deng disclosure is making a
18 notch, and it goes on to say that the method here is simple in
19 this technique and it delivers good operational performance.
20 It also says here in the disclosure that it enhances
21 electrical performance of the batteries.

22 So what you see, ladies and gentlemen, when you combine
23 Deng and Wang together, you have all of the elements of the
24 '352 Patent combined.

25 Now, the clear teaching of what you saw here with Deng is

1 evidence of the desirability of combining the two references.
2 And what you get when you add that electrode plate notch is
3 everything that was disclosed in the '352 Patent. A person of
4 skill in the art would clearly recognize the desirability of
5 this combination and, therefore, it invalidates that
6 reference.

7 The other thing we did, ladies and gentlemen, was talk to
8 you a little bit about non-infringement, and what we've gone
9 back to is the instructions which explain that if a device is
10 missing even one limitation or element, it does not infringe
11 that claim.

12 Now, we start here again with Doctor Martin because ATL
13 did not prove infringement in this matter. What happened here
14 was you see in some of the diagrams here the raw electrode,
15 which Doctor Martin did review, but then that goes through the
16 process of battery manufacturing facilities for formation and
17 that ultimately turns into the final battery cell of the
18 accused products.

19 And what Doctor Martin admitted was or said was, "As many
20 of the additives are present in relatively small amounts,
21 large changes in their relative concentrations or even changes
22 to their presence entirely can be brought about by various
23 reactions to form the anode and cathode SEIs in these
24 batteries."

25 And so what happened is he didn't actually go through the

1 process of testing through to find out whether what's claimed
2 in the patent, the '352 Patent, is actually present in the
3 final battery cells, because he stopped with the raw
4 electrolytes.

5 That's not scientific, ladies and gentlemen. Doctor
6 Lucht actually went through the process and found what needed
7 to be found there.

8 Now, the other thing we have and when we look at claim 1
9 of the '352 Patent is we want to recall that there is a
10 reference in the claim to corresponding elements, and these
11 basically were dealt with in the process specifications as the
12 offset grooves and size differences.

13 And what we've found here from the process specifications
14 at CosMX is that by design CosMX's electrodes have a cleaning
15 dislocation, which means the two areas are intentionally
16 mismatched. We also saw that the directives are that the
17 dimension of the positive electrode cleaning area is to be
18 different on both sides. In other words, ladies and
19 gentlemen, what actually happens with regard to CosMX's
20 products is not what's claimed in the '352 Patent for
21 corresponding elements.

22 And so what we've shown, ladies and gentlemen, is that
23 the '987 Patent, the '363 Patent, and the '352 Patent are not
24 infringed because the evidence wasn't brought to you by ATL in
25 that regard, and we've shown you where there are departures

1 with regard to elements, and we've also shown you where there
2 was a failure on their part to actually go through the process
3 of trying to prove that what they are looking at actually
4 winds up in CosMX's products.

5 So, in summary, we had claim 1 and 17 of the '987
6 separator patent which we've found to be invalid and not
7 infringed; claim 1 of the '363 electrolyte patent is invalid
8 and not infringed; claim 1 of the '352 Patent, the electrode
9 patent, is invalid and not infringed.

10 Now, that brings us back to the point I made earlier on
11 about ATL having a problem, and the problem is that they've
12 been exposed in their efforts to compete unfairly against us
13 in the marketplace as we've been gaining on them. And what we
14 know is that anti-competitive acts, other than competing on
15 the merits, would have an effect of preventing or excluding
16 competition or frustrating the efforts of other companies to
17 compete would violate the antitrust laws. Those are
18 anti-competitive acts.

19 And what we started with here was remember we were
20 beginning to grow fast enough to where it came to a point
21 where CosMX decided that it wanted to go public and actually
22 put out an initial public offering. And what Mr. Li, the vice
23 president of CosMX, explained under oath was that, okay, and
24 the question here was, "What was CosMX planning to do with the
25 money that it raised in the IPO?"

1 And the answer was, "We planned to use that fund to buy
2 land to set up facilities for the manufacturing and to
3 increasing our manufacturing capability as well as the
4 improvement of our quality and technology development."

5 And this again, ladies and gentlemen, was part of what
6 ATL had been watching and not been happy about.

7 We already talked about the fact that Mr. Lam testified
8 that they -- when CosMX was trying to do the IPO, they
9 basically tried to find ways to frustrate that, including
10 filing lawsuits. But that wasn't the only thing that they
11 did. They also contacted the authorities about CosMX's IPO to
12 try to throw a wrench in the spokes of that progress.

13 Now, the other thing that they did was you heard about
14 this idea of them asserting a slew of patents in China as a
15 way of trying to derail CosMX in its progress. And from the
16 lawyer here, Yanxi Liu, a Chinese patent lawyer, what he
17 explained was that out of the eight purported patents, he
18 found seven of them to be completely baseless and one likely
19 to be baseless.

20 Now, this testimony, ladies and gentlemen, was
21 un rebutted. There was no lawyer who was an authority on
22 Chinese law who said that Mr. Liu was wrong in this regard.
23 This is uncontested testimony. And what he's talking about
24 here is that the assertion of these patents was designed to
25 hurt CosMX, to hurt competition, and it was anti-competitive.

1 We also saw the efforts to frustrate CosMX's progress and
2 to delay the IPO, and CosMX's becoming the target of attempted
3 monopolization efforts by ATL.

4 THE COURT: Eight minutes remaining, counsel.

5 MR. IVEY: Thank you, Your Honor.

6 We had the graph here for the smartphone soft pouch LIB
7 shipments, ATL versus CosMX, share for Q2021. And this is a
8 global reference here. In 2021, ATL had 40 percent and CosMX
9 had 10 percent. Now, after the efforts to derail CosMX and to
10 hurt competition, both with CosMX and generally, what you see
11 here is for Q22, 2022, Q4 of 2022, ATL's share goes up to 53
12 percent and CosMX's share declines to 7 percent.

13 Ladies and gentlemen, we were clearly hurt by the efforts
14 ATL made to monopolize and to hurt us and to derail our
15 progress with regard to the IPO and our technological advances
16 in the market. Their efforts to disrupt hit the mark, and it
17 was not only in the smartphone market, they also did the same
18 thing with regard to laptops.

19 We then had the testimony of Keke He, who explained that,
20 "As I mentioned before," the delay was caused by ATL's letter
21 of infringement. And the delay she's talking about there is
22 the effort for CosMX to complete its IPO. This was -- the
23 letter that ATL sent triggered the regulatory review and
24 inquiry. And it, again, hurt CosMX significantly.

25 Now, the harm to CosMX was explained by Doctor Maness, an

1 antitrust expert, and what he did was he gave us two sets of
2 numbers of problems. The first was with regard to the costs,
3 direct costs, related to the delay, and those were about \$3.1
4 million. For the patent investigation, IPO fees, he wound up
5 with \$3.1 million. But his analysis did not stop there and
6 the damage didn't stop there.

7 Harm from the delay of the IPO, as Doctor Maness
8 explained, was that the expected price of the IPO was \$490
9 million. The actual price received was \$341.7 million, with a
10 shortfall of about \$148 million; that, in addition to the \$3.1
11 million that was also out of pocket.

12 Now, there's no question, ladies and gentlemen, that what
13 Doctor Maness was explaining was a real harm to CosMX. It was
14 intended to harm and it was foreseeable that it would cause
15 harm. The antitrust injuries were clear here, and there was
16 also injury to competition in general. They hurt our
17 reputation with this in the market globally and in the United
18 States.

19 And while ATL tries now to hide behind market
20 fluctuations or uncertainties or other smoke and misdirection
21 that they try to throw up here, they shouldn't be excused for
22 what they intended to do and what they were able to
23 successfully do here, which was cause this delay. And we
24 don't come here lightly, but we ask you to not let them get
25 away with this.

1 Now, what we now have, ladies and gentlemen, is I've come
2 to the end of my time talking with you, and we'll be asking
3 you at the close of the case to return your verdict in our
4 favor. There will be a verdict form which the Court will
5 supervise and you will be given that form.

6 There will be a number of questions on it that we want
7 you to look at carefully with all -- but we start with
8 Question 1, which has to do with whether the Plaintiff by a
9 preponderance of the evidence has proven infringement of the
10 '987 Patent, the '363 Patent, or the '352 Patent. And the
11 answer for that is no in each case.

12 With regard to our claims that, in fact, we have proven
13 by clear and convincing evidence that each of the patents, the
14 '987 Patent, the '363 Patent, and the '352 Patent, are indeed
15 invalid because they are anticipated or obvious, we ask you to
16 check yes with regard to each of those.

17 And with regard to the antitrust issues, you'll be given
18 a number of instructions, and you've heard from the Court
19 extensively on this. The questions are whether the Defendant
20 by clear and convincing evidence used the threat of Chinese
21 litigation to objectively and baselessly attempt to interfere
22 directly in the business relationships for CosMX and to harm
23 competition, and the answer to that is yes. That's exactly
24 what they were doing. And they knew that they were doing it.
25 They did it on purpose, and as I say, their efforts hit the

1 mark.

2 The other questions you have here are 6[a], [b], and [c]
3 with regard to whether there was an engagement by
4 anti-competitive conduct by ATL. We believe the proof there
5 is yes.

6 We also think that ATL has been shown to have an intent
7 to achieve monopoly power in the relevant markets. The answer
8 to that is yes.

9 And whether we should find that ATL's anti-competitive
10 conduct was the proximate harm to CosMX's business and
11 property, the answer, as Doctor Maness explained, is
12 definitely over \$150 million in damages in that regard.

13 And so that's one of the other questions you'll be asked
14 with regard to this is, what do you find in damage for the
15 antitrust violations and for the unfair competition. We ask
16 you to go with Doctor Maness' calculations in that regard.

17 We ask you to vindicate CosMX from the unfair competition
18 and the efforts to derail its fair and impressive track record
19 of competing globally and in the United States by awarding us
20 the findings of not infringing, proving invalidity of these
21 patents, and proving each and every element of the antitrust
22 claims that we've brought here today in this case.

23 The last thing I want to do very quickly, ladies and
24 gentlemen, is actually extend a more heart-felt thank you than
25 I did at the very beginning of this. I said thank you for

1 your service, and I meant that. Taking the oath here is
2 extraordinarily important, and we know it's a tremendous
3 disruption to your daily lives.

4 One of the things that I have been impressed with here
5 during the course of our investigation is how diligent you've
6 been, how reliable you've been, how attentive you've been.
7 And we do appreciate you for being here, giving us our day in
8 court, letting us be in the room to talk about these patents,
9 and letting us have our opportunity to right a serious wrong.

10 Thank you.

11 Thank you, Your Honor.

12 THE COURT: Plaintiffs may now present their final
13 closing.

14 You have 19 minutes and 35 seconds remaining. Mr.
15 Powell, would you like a warning on your time?

16 MR. POWELL: Thank you, Your Honor. At 10 minutes
17 and five minutes, if you would.

18 THE COURT: Ten minutes remaining and 5 minutes
19 remaining, I will give you those warnings. You may proceed.

20 MR. POWELL: Thank you.

21 Now, I want to start by summarizing a few key points of
22 ATL's damages claim.

23 If we could go to the first slide there, Mr. Fisher,
24 12.2.

25 This is for infringement of all three patents. And

1 fortunately CosMX has made this part of my job a lot easier:
2 One, by agreeing that the appropriate measure of damages in
3 this case is a running royalty; and, two, not presenting any
4 competing opinion as to the proper royalty base for all
5 infringement.

6 If we go to the next slide.

7 In light of this, the verdict form already indicates that
8 the award will be for a running royalty. And to remind
9 you-all of why, you will recall ATL's damages expert, Mr. Alan
10 Ratliff, testified about how all three asserted patents have a
11 remaining life of more than a dozen years. This means that if
12 CosMX continues to use ATL's patented technology, it will
13 continue to pay ATL a royalty even after this case is over,
14 and they will do so for as long as they use ATL's patented
15 technology. Should CosMX in the future decide to stop using
16 that technology, they will be able to stop paying the royalty.

17 Next slide, please.

18 You might recall Mr. Ratliff giving you the analogy of
19 paying rent on your apartment or home. Rent is like a
20 royalty, he said. You pay to use someone else's property. So
21 if you rent your home, you pay rent while you live there. If
22 you move, you stop paying rent. Same thing with a running
23 royalty.

24 Next slide.

25 And Mr. Alan Ratliff told you that the amount of royalty

1 or rent due for ATL -- to ATL for CosMX's use of ATL's
2 patented technology through the end of this trial, which we
3 hope is going to be today, is \$7,570,661.

4 Now, I realize this is a large amount of back rent to
5 have to pay, but remember CosMX had a chance to license the
6 patents back in June 2021 and they chose instead to continue
7 using ATL's patented technology without paying rent. So that
8 is why the number is as big as it is now.

9 Next slide.

10 And just to put that number in context, I want to remind
11 you of the amount of sales CosMX has made since then using
12 ATL's patented technology. Mr. Ratliff showed you this slide
13 during the trial, and he explained how he calculated that
14 CosMX has made over half a billion dollars by selling battery
15 products that use ATL's patents.

16 And he told you CosMX's profit margin on those sales is .
17 , which is substantially higher than the margin
18 CosMX gets on non-infringing battery products that it also
19 sells. And, of course, as we heard during the trial on cross
20 examination from CosMX's damages expert, Mr. Schoettelkotte,
21 CosMX did not bother to calculate an alternative sales royalty
22 base and ultimately ended up using the same sales number that
23 Mr. Ratliff did to calculate its alternative running royalty.

24 So Mr. Ratliff is the only one -- Mr. Ratliff's is the
25 only one you have and the only one you should use in

1 considering what the reasonable royalty should be in this
2 case.

3 Mr. Fisher, if we could jump to the end here at 2.14.

4 In view of all this, ladies and gentlemen, ATL that you
5 find CosMX infringed the '987, the '363, and the '352 Patents
6 and that all three patents are valid. And in response to this
7 question as to what sum of running royalty do you find ATL has
8 proven it is entitled to through today, we ask that you write
9 in, \$7,570,661.

10 Now, let's talk about some invalidity issues that came up
11 during Mr. Ivey's presentation, and a couple of issues up
12 front.

13 First, the DP018/SW-E7/DP060 issue, you know, the Defense
14 here is trying to suggest that we accused a prior art product
15 infringement. That's just not true. What we learned during
16 trial is that CosMX's lawyers made a mistake, they gave us the
17 wrong information. Now they're trying to capitalize on that
18 wrong information and create an escape hatch. Don't let them
19 get away with it.

20 Dp018 is not DP060. We accused DP060, not DP018. We
21 know those aren't the same because Dr. Suli Li testified here
22 in court that when they assign a number to an electrolyte,
23 it's different. So there is no way that DP018 can be DP060.
24 I want that to be clear.

25 Secondly, you heard Mr. Ivey say yet again that they

1 weren't in the room during patent prosecution, they
2 didn't -- the Patent Office didn't consider the prior art.
3 Well, let's remember what happened here in trial. Doctor
4 Lucht admitted on cross examination that each of Ueki, Wang,
5 and Deng was considered by the Patent Office in a further
6 proceeding on the '987 and '352 Patents.

7 Also, as you heard during trial, the U.S. Patent Office
8 does accept prior art submissions from any interested person
9 during prosecution. So CosMX could have submitted all of its
10 prior art to the Patent Office during the prosecution of all
11 three patents. And that's true for all eight references.
12 Ueki, iPod Touch 6, Samsung S9, DP018, SW-E7, Zeng, Wang,
13 Deng, all of those could have been submitted during the
14 original prosecution of these patents, had CosMX chosen to do
15 so.

16 Now, let's go to my first slide in the invalidity
17 section. I think it's 12.6, Mr. Fisher.

18 During trial, CosMX claimed that Ueki anticipates claim 1
19 of the '987 Patent. However, I'm hoping that you were all
20 listening closely to the Court's instructions. You see,
21 anticipation requires that a single prior art reference
22 disclose not only each element of the claim but that it also
23 enable one of skill in the art to practice the full scope of
24 the invention without undue experimentation.

25 We heard in the trial about chemistry labs and two hours

1 of lab experiments, an hour of math. That is undue
2 experimentation, ladies and gentlemen.

3 Now, for the '987 Patent, CosMX never presented evidence
4 that Ueki enabled the full scope of claims 1 or 17. This is
5 because Doctor Lucht never analyzed this question. Doctor
6 Lucht completely overlooked it.

7 And, of course, on cross examination, I was able to get
8 Doctor Lucht to acknowledge that Ueki does not teach the full
9 scope of claim 1 of the '987 Patent. In particular, Ueki does
10 not teach the quotient of Dv90 to the inorganic particles over
11 the thickness of the porous layer. And we know that is
12 one-half of that last element on this chart, which I've
13 modified. This was Defendant's chart in trial. I've put an X
14 where it needs to be which is they can't meet that element
15 ratio Dv90 of the inorganic particles to the thickness of the
16 porous layer. It's not there; it's not enabled.

17 Now, Ueki also fails to teach the other component there,
18 the range of .3 to 3.0, that the quotient falls in that range.
19 That's not in Ueki nowhere, and it doesn't teach you that
20 that's an important range. So don't be swayed. Ueki doesn't
21 anticipate the '987 Patent.

22 Now let's goes to next slide, the iPod Touch 6. Now,
23 CosMX also claimed that the iPod Touch 6 anticipates both
24 claims here. Actually, I correct myself. Ueki, they don't
25 even assert against claim 17, so that claim survives over Ueki

1 without any dispute.

2 Now, the iPod Touch 6, they do assert against both claims
3 1 and 17. But, here again, the prior art simply does not
4 teach all the elements of claim 1 and 17. Just like Ueki,
5 they don't teach the quotient of Dv90 of the inorganic
6 particles over the thickness of the porous layer. How could
7 it? It's just a battery and a product. It doesn't have
8 instruction guides that teach you about the separators that
9 are used in -- in -- in the battery. It doesn't have any of
10 that. So this is not an enabling piece of prior art. It
11 cannot anticipate either claim of the '987 Patent.

12 So it also doesn't teach the range, .3 to 3.0. How could
13 it? How could a product teach you what the important range is
14 for the Dv90 quotient? It can't do it and it doesn't do it
15 and don't be swayed.

16 Now, there is an additional problem with the iPod Touch 6
17 battery. CosMX has failed to carry its clear and convincing
18 burden to establish that the iPod Touch 6 is even prior art.

19 First, they failed to do sufficient evidence to show that
20 the device was actually the same as it was when it was first
21 sold six years ago. And they have to show it's the same as it
22 was when it was first sold because that's the triggering point
23 for prior art. They didn't even show it was a commercial
24 sale. Maybe it was an experimental sale to -- to someone else
25 who was going to run experiments on it. They didn't provide

1 any evidence of that. They just assume it.

2 And they didn't say it was ready for patenting to get to
3 these claims which are very specific with the Dv90 quotient to
4 the thickness of the porous layer. This product doesn't say
5 that it could patent that at that time. There's nothing
6 there. So despite what CosMX says, the iPod Touch 6 cannot be
7 qualified as prior art. And even if it could, it simply could
8 not anticipate the '987 Patent.

9 THE COURT: Ten minutes remain.

10 MR. IVEY: All right. Let's skip over the next
11 slide and go to the Zeng reference.

12 During trial, CosMX claimed that Zeng anticipates claim 1
13 of the '363 Patent. However, CosMX never presented evidence
14 that Zeng enabled the full scope of any claim -- of claim 1 of
15 the '363 Patent. And, in fact, Zeng failed to teach the
16 propyl propionate weight percentage. That's a key component
17 of this patent--didn't teach it.

18 Here again, Lucht never analyzed whether Zeng enabled the
19 full scope of the claim. He completely overlooked that step.
20 And Zeng, like we saw for the '987, here Zeng doesn't teach
21 the specific formula. There is no teaching of X plus Y, which
22 is dinitriles and trinitriles. There's no teaching of X
23 divided by Y, and there's no teaching of Y divided by Z, which
24 is trinitriles divided by propyl propionate. These formulas
25 cannot be found in Zeng. I urge you to read it; you will not

1 find them.

2 You know where you also won't find them? In the Samsung
3 S9, which is the other prior art reference that they're
4 asserting. So we jump ahead to that. You won't find these
5 formula in the product. How could you? The product
6 documentation, which we don't have, isn't going to tell you
7 and certainly you're not going to find it printed on battery.
8 It doesn't show this formula. It cannot anticipate.

9 That goes equally -- next slide -- for the DP018 and
10 SW-E7 electrolytes. These are emails. They are not even
11 commercial offers. That most likely was testing. So they
12 haven't met that threshold. They don't show it was ready for
13 patenting. They certainly don't show how the email taught the
14 formula in the '363 Patent. Right? There's no X plus Y, X
15 divided by Y, Y divided by Z. You won't find that in the
16 emails because it's not there. And so you also should not be
17 swayed by that evidence. It does not enable the full scope of
18 the claims.

19 Finally we get to the '352 Patent. We looked at Wang.
20 They acknowledge Wang does not have the notch, so that's not a
21 piece of prior art that is entitled to that much credit. So
22 they try and combine it with Deng, but, of course, Deng on its
23 own didn't have the notch groove, so that piece of prior art
24 on its own is also deficient.

25 If we go to the next slide just to summarize.

1 Cosmx instead said that it was the combination of these
2 two that rendered the patent obvious.

3 As a threshold matter similar to Zeng above, CosMX failed
4 to present evidence sufficient to establish Wang and Deng were
5 actually printed publications which would qualify it as prior
6 art in the first place. We heard testimony Doctor Lucht
7 didn't even know how he got them, didn't know if it was
8 published, didn't know if it was available to U.S. citizens,
9 didn't know if it was in English. There were all kinds of
10 problems with these pending Chinese patent applications.
11 Because of that, they didn't meet their burden of proof of
12 clear and convincing evidence.

13 In addition, CosMX failed to adduce evidence establishing
14 that the reference -- Deng reference is pertinent or analogous
15 art. They're required to do that. We learned that Deng
16 teaches a notch for curtailing deformation. The '352 was to
17 eliminate burrs. Those aren't even related. These two things
18 should not be combined.

19 Okay. Let's leave invalidity. And I'm sorry I'm going
20 too fast, but I do feel I'm pressed for a bit of time here.

21 Now, go to -- we are going to start here at 12.1,
22 Mr. Fisher.

23 Ladies and gentlemen, I said in my opening statement
24 that CosMX is and even celebrates that it is a low-cost
25 provider of lithium-ion batteries. Well, you say -- you saw

1 yourselves that CosMX did just that during the trial.
2 Mr. Alex Li, VP of legal -- patent and legal affairs of CosMX
3 testified under oath that CosMX tries to get to market quicker
4 with batteries that are comparable in performance but they do
5 it for cheaper. Now, ladies and gentlemen, think about it.
6 How do they do that? How do they achieve the same level of
7 technology at a cheaper price? The answer is obvious--by
8 imitating ATL. By imitating ATL, CosMX does not have to
9 invest in R&D, and the elimination of that significant expense
10 is why they can charge less for the same level of performance.

11 Next slide.

12 You heard from Doctor Maness that -- on cross examination
13 that CosMX has far fewer patents than its competitors do.

14 Next slide.

15 And you'll recall Dr. Suli Li, who testified live, she
16 could not even confirm or deny whether CosMX had even 10
17 United States patents. You heard testimony from Mr. Lam that
18 ATL has almost 300.

19 Only one inference can be drawn from all of these facts
20 now proven and rebutted, namely that CosMX simply does not
21 invest in developing the incremental improvements in battery
22 performance that the top brand customers like
23 and demand in their products.

24 So how does CosMX imitate ATL's technology?

25 Next slide.

1 THE COURT: Five minutes remaining.

2 MR. POWELL: First, they target hiring ATL's top
3 engineers by offering them stock compensation. As you heard
4 from the former senior engineer Dr. Suli Li, who testified
5 live, CosMX offered her millions of R&B in stock to jump ship
6 from ATL to CosMX. And you heard Joe Lam explain that ATL as
7 a subsidiary of TDK cannot offer stock options to its
8 employees, so the Defendant here is taking advantage of that
9 limitation.

10 Now, this is why today over half of CosMX's pending
11 patent applications and patents have at least one former ATL
12 engineer as an inventor. This is just astonishing, ladies and
13 gentlemen. More than half of CosMX patent filings would not
14 exist if it were not for ATL-trained engineers. It is also
15 why CosMX is able to file look-alike patents that in some
16 instances are nearly verbatim to what is in ATL's patents.
17 You'll recall that this -- Dr. Suli Li, who was also head of
18 electrolytes at CosMX, was one of the named inventors on the
19 Dv90 look-alike patent.

20 Now, we jump forward to senior engineer in charge of
21 reverse engineering Mr. Meng Cao, who also testified by
22 deposition. This is -- he reversed engineers ATL's products.
23 That's the other way they imitate. He even admitted that they
24 specifically look for the ratios in ATL's '363 electrolyte
25 patent. That fact -- the fact that they analyzed the ratios

1 in ATL's patents proves CosMX knows about the '363 Patent and
2 that renders CosMX's infringement of this patent willful.

3 Now, in the interest of time I'm going to skip ahead to
4 another point here.

5 Let's go to the 12.2, Mr. Fisher.

6 And I'm just going to summarize the infringement case
7 again.

8 The '987 separator invention --

9 Can you get there, Mr. Fisher?

10 The separator invention where ATL's engineers discovered
11 that optimizing the ratio of Dv90 over inorganic particles to
12 the thickness of the porous layer, ATL presented substantial
13 evidence of infringement. CosMX has no evidence to rebut
14 Doctor Hayes. They didn't do any analysis themselves.

15 The same is true for the '363 Patent.

16 The same is also true, of course, for the '352 Patent.
17 We had substantial evidence of infringement. They didn't have
18 any of their own evidence to show non-infringement.

19 If we could jump to the final slide here, which is going
20 to be 12.9, Mr. Fisher.

21 The verdict form. And sorry the slides were a little
22 delayed there, ladies and gentlemen.

23 In conclusion, I ask that you find in favor of my client
24 ATL and against CosMX and check the box "yes" for infringement
25 of each patent. Also check the box "yes" for willful

1 infringement.

2 Then I also ask that you when you proceed to validity
3 that you check the box "no" for each asserted claim, thereby
4 confirming that the innovations of these three patents are
5 entitled to patent protection.

6 And the next slide, finally, I ask that on the verdict
7 form when it asks you for the reasonable running royalty, that
8 you put there \$7,570,661.

9 And if there's any time left, I yield it to Mr. Wolfson.

10 THE COURT: There's a little bit.

11 MR. WOLFSON: I will be brief.

12 Ladies and gentlemen, in Mr. Ivey's final closing
13 arguments he didn't really respond to all the points I made to
14 you about the free speech burden that they have to meet by
15 clear and convincing evidence, the failure to prove an actual
16 harm to competition, failure to prove an actual harm to CosMX.

17 When you get to Question No. 5 today, that is the free
18 speech question, have they proven by clear and convincing
19 evidence that the assertion of the patents in China was
20 objectively baseless and subjectively motivated to interfere
21 with their business, all you have to do is check "no." And
22 then if you check "no," that's it on the antitrust claims.

23 If you are able to get past the clear and convincing --
24 well, if they are able to get past the clear and convincing
25 burden that they bear on that question, then all the rest of

1 the questions, for all the reasons that I mentioned to
2 you--inability to show specific intent to monopolize,
3 inability to show dangerous probability of monopolization,
4 inability to show that this case should even be in the United
5 States--it's just "no," "no," "no," to all the questions
6 No. 6.

7 Thank you.

8 THE COURT: All right, ladies and gentlemen, you've
9 now heard closing arguments from counsel for the competing
10 parties. I have just a few short additional instructions
11 before I direct you to retire and consider your verdict.

12 You must perform your duty as jurors without bias or
13 prejudice as to any party. The law does not permit you to be
14 controlled by sympathy, prejudice, or public opinion. All
15 parties expect that you will carefully and impartially
16 consider all the evidence, follow the law as I have given it
17 to you, and reach a just verdict regardless of the
18 consequences.

19 Answer each question in the verdict form based on the
20 facts as you find them to be, following the instructions that
21 the Court has given you on the law. Again, do not decide who
22 you think should win this case and answer the questions to
23 reach that result. And I'll remind you once more, your
24 answers to the questions in the verdict form must be
25 unanimous.

1 You should consider and decide this case as a dispute
2 between persons of equal standing in the community of equal
3 worth and holding the same or similar stations in life. This
4 is true in patent cases between corporations, partnerships, or
5 even individuals. A patent owner is entitled to protect its
6 rights under the laws of the United States. The law
7 recognizes no distinction among types of parties, and all
8 corporations, partnerships, other business organizations all
9 stand equal before the law, regardless of their size,
10 regardless of where they come from, and they are to be treated
11 as equals.

12 Now, when you retire to the jury room to deliberate on
13 your verdict, as I've told you, you're each going to have your
14 own printed copy of the instructions I've given you today, the
15 Court's charge to the jury. During your deliberations if you
16 desire to review any of the exhibits which have been shown to
17 you during the trial and which the Court has admitted into
18 evidence, then you should send me a written note signed by
19 your foreperson requesting that exhibit or those exhibits, and
20 if you do, I will send that exhibit or those exhibits to you.

21 Once you retire, you should first select your foreperson
22 and then conduct your deliberations. After you've reached a
23 unanimous decision as to all the questions in the verdict
24 form, your foreperson should complete the form reflecting
25 those unanimous decisions, sign it, and date it on the last

1 page, and then notify the Court Security Officer that you've
2 reached a verdict.

3 Do not reveal your answers on any question unless
4 instructed to do so, and you must never reveal to anyone,
5 not even to me, your division -- your numerical division on
6 any unanswered question.

7 Any notes that you've taken over the course of this
8 trial, ladies and gentlemen, are aids to your memory only.
9 You have to rely on your memory of the evidence, and your
10 notes, if you took any, are simply to refresh your
11 recollection of the evidence over the course of the trial. A
12 juror who has not taken notes must rely on his or her memory
13 and their own independent recollection of the evidence and
14 should not be unduly influenced by the notes of other jurors.
15 Notes are not entitled to any greater weight than the
16 recollection or impression that each juror had about the
17 testimony.

18 Now, during your deliberations if you want to communicate
19 with me at any time, you should give a written message or
20 question signed by your foreperson to the Court Security
21 Officer who will bring it to me. I'll then respond as
22 promptly as possible either by responding in writing to you or
23 by having you brought back into the courtroom where I can
24 address you orally. And I will always first disclose to the
25 attorneys in the case your question and my intended response

1 before I answer any question you might send me.

2 Now, after you've reached a verdict and the Court has
3 accepted your verdict and discharged you as jurors, I want you
4 to understand at that point you will not be required to talk
5 with anyone about the case unless you choose to. But you will
6 also at that same point be completely free to talk about your
7 experience as jurors if you choose to. That decision at that
8 time will be completely 100 percent your decision and yours
9 alone; nobody else's.

10 I'm now going to hand eight printed copies of the Court's
11 final jury instructions and one clean copy of the verdict form
12 to the Court Security Officer who will deliver them to you in
13 the jury room.

14 Ladies and gentlemen of the jury, you may now retire and
15 deliberate on your verdict. We await your decision.

16 (Whereupon, the jury left the courtroom.)

17 THE COURT: Be seated, please.

18 Counsel, you are welcome to wait here in the courtroom
19 while the jury deliberates. You are welcome to leave a
20 representative here in the courtroom while the jury
21 deliberates. You are also welcome to be off premises, but I
22 don't want you to go far. I don't want you to get scattered
23 and I want you to be available to be recalled promptly in the
24 event I get a question from the jury or at the time they
25 return the verdict. We have I believe cell phone numbers for

1 a representative from each side. Keep those phones close
2 because if we call, we expect you to come.

3 Awaiting either a note from the jury or the return of
4 their unanimous verdict, Court stands in recess.

5 (Jury deliberates.)

6 THE COURT: Be seated, please.

7 Counsel, I've received the following note from the jury.
8 I'll read it into the record, I'll mark it for identification,
9 and then I'll deliver the original note to the Courtroom
10 Deputy. The jury's note reads as follows: "Can a claim be
11 both infringed upon per the claim items and found invalid in
12 the later question?" And it's signed by Juror No. 1,
13 Ms. McAnear, as foreperson.

14 I'm going to mark it with a 1 in the upper right-hand
15 corner and I'll hand the original note to the Courtroom
16 Deputy.

17 Now, having read their question, I've prepared a written
18 response. And if one person from each side will approach the
19 Courtroom Deputy, I'll give you a copy of what I've prepared
20 as a written response and then I'll review it with you.

21 The Court's proposed response is as follows: "Members of
22 the jury, in response to Jury Note No. 1, as I've instructed
23 you on page 8 of the Court's charge, invalidity and
24 infringement are separate and distinct issues. Your job is
25 to decide whether CosMX has infringed the asserted claims and

1 where those claims are invalid.

2 "The instructions in the verdict form make it clear in
3 the instructions at the bottom of page 4 of the verdict form
4 that you are to answer Question No. 2 regardless of how you
5 have answered questions 1a, 1b, and 1c."

6 Is there any objection from either party for me to send
7 that written response back to the jury?

8 MR. THOMPSON: No objection from the Plaintiff, Your
9 Honor.

10 MR. IVEY: No objection from the Defense.

11 THE COURT: All right. Then I will execute the
12 written response from the Court to the jury. I'll hand one
13 executed copy to the Courtroom Deputy to be included in the
14 papers of this cause. I'll give one executed original of this
15 written response to the Court Security Officer and direct him
16 to deliver it to the jury.

17 And with that, counsel, awaiting either another note from
18 the jury or a return of their verdict, we stand many recess.

19 (Deliberations continue.)

20 THE COURT: Be seated, please.

21 Counsel, I've received a second and a third note from the
22 jury. I will read the two, and I have a copy for each side
23 that you can approach and get from the Courtroom Deputy after
24 I've read them.

25 Note No. 2, which I've marked with a 2 in the upper

1 right-hand corner for identification, says, "May we see the
2 demonstrative exhibits for Patent '352, claim 1?"

3 The second note, which I got shortly thereafter -- the
4 third note, rather, that I got shortly thereafter, which I
5 marked with a 3 in the upper right-hand corner for
6 identification, says, "May we see the testimony of Mr. Lewis
7 Hruska and Mr. Peipei Guo in reference to the '352 Patent?"

8 If you would like this, I have a printed copy of these
9 two notes. You can approach and get a copy for each side from
10 the Courtroom Deputy. And I'll hand the original notes to the
11 Courtroom Deputy for inclusion in this case.

12 I have prepared a response which I'd like to go over with
13 you and then I'll see if there are any objections to it.

14 The Court's proposed response is as follows: "Response
15 to Jury Note No. 2 and No. 3.

16 "Members of the jury, in response to Jury Note No. 2, as
17 I have instructed you previously, the demonstrative exhibits,
18 sometimes simply called demonstratives, are not evidence and
19 cannot be reviewed by you during your deliberations, but a
20 witness' testimony given with the aid of a demonstrative is
21 evidence.

22 "Demonstratives for Plaintiff are typically marked PDX,
23 meaning Plaintiff's Demonstrative Exhibit, and for Defendant
24 as DDX, meaning Defendant's Demonstrative Exhibit. Actual
25 exhibits designated by the Court are typically marked as PTX

1 and DDX, meaning Plaintiff's Trial Exhibit and Defendant's
2 Trial Exhibit. In some cases an exhibit is jointly submitted
3 by both parties, and those are typically marked JTX, meaning
4 Joint Trial Exhibit."

5 "Response to Juror Note No. 3.

6 "I cannot send you, 'the testimony' of any witness. You
7 must rely on your memories of the testimony of each witness.
8 The written transcript of what was said during the trial is
9 not available to send to you. It is prepared in case there is
10 an appeal from this court to an appellate court. You have to
11 rely on your own memories of the testimony of the witnesses.
12 Any notes you may have taken are to refresh your memories and
13 recollection of the witness' testimony."

14 Are there any objections from either party to me sending
15 that written response to these two notes back to the jury?

16 MR. THOMPSON: No objection from Plaintiff, Your
17 Honor.

18 MR. IVEY: No objection from Defense.

19 THE COURT: All right. Then I will execute the
20 written version of that responsive note, I'll hand it to the
21 Court Security Officer, and direct him to deliver it to the
22 jury. I will also execute a duplicate of that written
23 response which I will hand to the Courtroom Deputy to be
24 included in the papers of this case.

25 All right, counsel. Stay tuned. Awaiting either another

1 note or return of a verdict, we stand in recess.

2 (Deliberations continue.)

3 (Jury left for the day.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts

02/08/2024

10 _____ DATE _____
11 SHAWN McROBERTS, RMR, CRR
12 FEDERAL OFFICIAL COURT REPORTER
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